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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term 1988

No.

ANDREA AIELLO, a/k/a "ANTONIO AIELLO," and LORENZO SCADUTO,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM E. LORE, Esq.
Attorney for Petitioner Aiello
118-21 Queens Boulevard
Forest Hills, New York 11375
(718) 544-8006

MICHAEL VINCENT RICCI, Esq.*
Attorney for Petitioner Scaduto
11-01 154th Street
Whitestone, New York 11357
(718) 767-2230

**Attorney of Record*

QUESTIONS PRESENTED

1. Do Ethical standards apply equally throughout the United States to give equal protection to U.S. citizens (with No waivers) in reversing convictions or do ETHICS apply only to California and only in favor of the Government in affirming convictions (with waivers)?

2. Should the trial judge have held a Rule 44(c) or Sixth Amendment inquiry when he knew of at least six conflicts *in the record* and who also should have known about conflicts which were "common knowledge" and "all of Brooklyn knew"?

3. Does the U.S. Government have an affirmative ethical duty to disclose conflicts which were "common knowledge" or do they only disclose, oppose or "manufacture" conflicts when defense counsel do a "fantastic job"?

4. Was it impermissible for Evseroff to *exclusively* control all referrals and

5. Was it constitutional, after a successful appeal, for the trial judge to resentence Scaduto *in absentia?*

6. Was it fair to convict and upon resentence for the trial judge to increase Scaduto's sentence from 35 years to 45 years on an 848 count where the *sole* evidence is a notebook found in someone else's house and which had *coded* names?

7. Is it fair for a Court and a Government in order to get a fugitive, to hold U.S. citizens hostage?

8. Was the trial judge prejudiced against Scaduto?

9. Can an Orwellian videotape based only upon a "search warrant order" be used against U.S. citizens without any Title III or Fourth Amendment safeguards?

10. After a successive motion and recusal of the trial judge, should the new District Judge have vacated the convictions after saying:

    "I can tell you, if this was my trial, and I don't say this critically of anybody, that I would have granted a new trial"?

11. After finding only "minimum standards of competency," "appearance of impropriety," "disturbing nature," "laundering," "delicts," and ethics only "for the future," should the District Judge have vacated the convictions?

12. Should the same Trial Judge, Government & Court of Appeals have used different standards compared to *Ruggiero* on the juror issue?

13. Should the Federal Government in New Jersey *(Gambino)* have higher standards than in New York?

14. When a Father controls, should the Court of Appeals apply different standards for trial in a Federal Court as compared to a State trial?

15. Were petitioners Fourth Amendment rights violated?

16. Were petitioners Fifth Amendment rights violated?

17. Were petitioners Sixth Amendment rights violated?

18. After a successive motion to expand before a determination on the merits, locating hidden information in a 10,000 page record, comments by the trial judge, and sworn testimony, should the Court of Appeals have restricted petitioners Constitutional and Ethical rights?

19. Is this case "on all fours" or *a fortiori* to *Wheat?*

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OPINION BELOW

The opinion below (Appendix A) arises under docket number 88-2140 under the title UNITED STATES OF AMERICA, *Defendant-Appellee*, against ANDREA AIELLO a/k/a ANTONIA AIELLO and LORENZO SCADUTO, *Petitioners-Appellants*. Andrea Aiello and Lorenzo Scaduto seek certiorari from this Court to review the order of the Second Circuit Court of Appeals affirming the judgment of the District Court, Eastern District of New York, 681 F. Supp. 1019 (E.D.N.Y. 1988) (Appendix C).

JURISDICTION

The Circuit Court order was filed October 21, 1988, and this petition was filed within 60 days.

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

The law involved in this case is the Fourth, Fifth, and Sixth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

The first appeal. Andrea Aiello and Lorenzo Scaduto, both law-abiding US citizens with no prior criminal record, were arrested in September 1983 and convicted in July 1984 on federal drug charges, though it was not shown they sold or possessed any drugs, records, equipment or proceeds.[1] Confined since arrest, petitioners appealed. Both joined in each other's Briefs.

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[1] In contrast, Salvatore Bartolotta ("Sal"), his wife Francesca, nee Ragusa, and Carlogero Salemi were found to have made sales and possessed drugs, paraphernalia, guns, and drug records.

Aiello argued: The surreptitious videotaping of his warehouse was unlawful and unconstitutional, and its admission was plain error, requiring reversal. No statute or rule authorized the district court to permit the videotaping. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 USC 2510-2520, encompasses only the interception of spoken communications, not visual activities. *United States v. Torres*, 751 F.2d 875 (7th Cir. 1984), *cert. denied*, 470 U.S. 1087 (1985). Rules 41(b) and 57(b) are restricted to ordinary search warrants for physical evidence and authorizations for pen register devices, which are far less intrusive. *United States v. New York Telephone Co.*, 434 U.S. 159 (1977) (dissenting opinion). Courts have no inherent power to issue video warrants, and even if they did, the order here was unconstitutional, because the standards for assessing its validity must be as stringent as those for Title III orders, *United States v. Katz*, 389 U.S. 347 (1967), *United States v. Giordano*, 416 U.S. 505 (1974), *In re Evans*, 452 F.2d 1239 (D.C.Cir. 1971), *cert. denied*, 408 U.S. 903 (1972). The videotaping was not shown to be necessary and thus was constitutionally unreasonable. *Berger v. New York*, 388 U.S. 41 (1967), *Osborn v. United States*, 385 U.S. 323 (1966), *Camara v. Municipal Court*, 387 U.S. 523 (1967), *United States v. Tortorello*, 480 F.2d 764 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973), *United States v. Lilla*, 699 F.2d 99 (2d Cir. 1983), *Dalia v. United States*, 441 U.S. 238 (1979), *United States v. Hess*, 482 F.2d 38 (2d Cir. 1973).

The Circuit Court found the record insufficient to review the order and held that petitioners waived the issue because their trial counsel had failed to raise constitutional or Title III grounds to suppress, failed to object on those grounds, and made affirmative use of the videotaped evidence. Aiello's conviction was affirmed. *United States v. Aiello*, 771 F.2d

621 (2d Cir. 1985) (*"Aiello I"*) (Appendix G).

The Circuit Court found meritless Scaduto's arguments that a notebook found in the Bartolotta house was erroneously admitted into evidence as a co-conspirator's statement without a showing that it was authored by a co-conspirator; that his counsel's summation was unreasonably curtailed; that one of the search warrants was defective; and that the trial judge's instructions permitted the jury to convict Scaduto of managing a criminal enterprise in the absence of proof he supervised five other persons. It rejected his point that the trial judge's failure to excuse a juror who doubted her own impartiality, and his *ex parte* contacts with her and an FBI agent, denied petitioners a fair trial,[2] and upheld an extended wiretap of a co-conspirator's phone, but did vacate Scaduto's conviction and remand for the purpose of combining his convictions and resentencing him.

Motion for a new trial. In December 1985, after the *Aiello I* decision but before Scaduto's resentencing, petitioners moved under Rule 33 for a new trial "in the interests of justice." Aiello asserted that his trial counsel, Taub, was forced on him and was the "puppet" of Evseroff, trial counsel for Scaduto, whose motion was based on Evseroff's ineffective assistance of counsel. Judge Costantino resentenced Scaduto *in absentia* over objection. He gave Scaduto an additional ten years on the 848 count. After two mandamus

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[2]Judge Costantino denied the defense request for a mistrial because he did not want to waste a ten-week trial. Contrast *United States v. Ruggiero* (2d Cir. 88-1083), where someone contacted only an ex-juror, yet at the government's request he granted a mistrial after seven months of trial.

Some of the counsel in that case—Carnesi, Lombardino, Fischetti—are the same as here. Carnesi was also involved in *Gambino, infra*, and the *Pizza* case and testified at a post-conviction hearing on Evseroff's conflicts of interest between his clients in the *Gambino* and *Pizza* cases.

petitions (Appendix H), he denied the motion summarily, finding no denial of the effective assistance of counsel (Appendix F).

On appeal, petitioners maintained that their Sixth Amendment rights were violated. They cited the failure to raise Title III or constitutional objections to a videotape; the admission of the Bartolotta notebook; Evseroff's conflicts of interest in his representation of the fugitive "number one" co-defendant Filippo Ragusa and co-conspirator Sal Bartolotta and the failure to call Sal as a witness, *United States v. Cancilla*, 725 F.2d 867 (2d Cir. 1984), DR 5-105(C) *Code of Professional Responsibility;* Evseroff's failure to discuss the conflicts with Scaduto and Judge Costantino's failure to inquire under Rule 44(c), *Strickland v. Washington*, 466 U.S. 668 (1984), *Cuyler v. Sullivan*, 446 U.S. 335 (1980), *Holloway v. Arkansas*, 435 U.S. 475 (1978); Evseroff's recruitment of Taub and other lawyers, *Wood v. Georgia*, 450 U.S. 261 (1981); the improper division and exclusive control of cash fees, *Code of Professional Responsibility;* the failure to have petitioners testify; the simultaneous representation of Scaduto, Francesca, Sal and Salemi by Jeffrey Rabin, Evseroff's employee, and other breaches of professional responsibility; and Scaduto's *in absentia* resentence was illegal and unconstitutional.

In its decision the Circuit Court began:

> Loyalty of a lawyer to his client's cause is the *sine qua non* of the Sixth Amendment's guarantee that an accused is entitled to effective assistance of counsel.

The Circuit Court cited allegations—"troublesome ones that may not properly be ignored"—of Rabin's association with

Evseroff, Evseroff's control of the defense, the failure to call Sal Bartolotta or to discuss potential conflicts with clients, contacting defendants without counsel's knowledge or consent, and the failure to preserve the confidences of clients —all "genuine issues of material fact". It "reversed and remanded for further inquiry into appellants' claims." *United States v. Aiello,* 814 F.2d 109 (2d Cir. 1987) (*"Aiello II"*) (Appendix E).

Judge Costantino's behavior. Taub swears *** "Frankly if Mr. Costantino wasn't the judge there, Scaduto would have been acquitted" and "I believe that Judge Costantino's handling of the case prejudiced Scaduto completely."

In open court, Judge Costantino at various times said:

> Power, I have. I told a group of children how powerful I am.
>
> The Court of Appeals can recommend anything they want. I'm still the trial judge and I will do it my way. If they don't like it they can send it back again. That's where I stand with it.
>
> Let the Court of Appeals tell me I am wrong again. It doesn't make any difference.
>
> I don't care what the Court of Appeals says. If they want to make a mockery of it—but not in my court. I know he would never testify in this court. I am certain of it. I am certain Bartolotta would never have testified.
>
> I am not the Court of Appeals. Some day they are going to learn about people in the courtroom at a

trial. That is the kind of judge I am. I don't quote sections of law. This thing works very well for me, thank God, until the Lord takes it away from me. No more.

When I speak from the bench, if Costantino said it, he won't back off on it. They know me well in the Court of Appeals.

Okay, I will have an order issued for Sal Bartolotta ***. I will bring in Sal Bartolotta ***. This is my hearing not your hearing. I ask all the questions and I become the lawyer ***. I will set up the hearing.

I'm not concerned how other judges handle their courtroom. I'm not concerned and they all know it.

***One thing nobody believes, I have a photographic mind. I can tell you what they were doing the day of the trial. I don't have a piece of paper in front of me when I try a case. I have no minutes. I don't write anything in a book or anything else. I can tell you what happens during the trial.

The law gave me a photographic memory, and I never can erase it until I desire to do so.

***Isn't it plain here, Mr. Esroth held back $500,000 unless they agreed to certain things which they gave to him; Isn't that so?

If I had to look at how all the lawyers are hired in the case I couldn't come out on the bench. I wouldn't be able to live with myself. If I examined how every lawyer was retained I wouldn't come out

> on the bench. Take that and put it in your pipe and smoke it.
>
> She [Francesca] has her method of release and she doesn't want to do it; that's her business, not mine. I told her to turn in her father and she'll be released from jail.
>
> You don't want to waive for resentencing? ***The Court finds there is no need [for Scaduto] to be present and it's the Court's ruling and not the defendant's ruling that's being recessed.

Successive motion to expand. After the remand, petitioners made a successive motion to expand. After Judge Costantino's recusal, the matter was assigned to District Judge Weinstein, who granted the motion. Depositions were conducted and the transcripts accepted into evidence, along with the motion to expand and the testimony of Evseroff and several other witnesses taken at a brief hearing before Judge Weinstein.

Judge Weinstein's oral determination. At oral argument (Appendix D), Judge Weinstein stated:

> I can tell you, if this was my trial, and I don't say this critically of anybody, that I would have granted a new trial."

Evseroff's insensitivity to ethics. Evseroff's history is well known to the Circuit Court, which observed in *Aiello II:*

> The affidavits submitted, including those submitted by counsel, if true, raise disquieting questions about trial counsel's insensitivity to issues of professional responsibility.

Evseroff confessed his ignorance of the law on conflicts of interest in representing multiple defendants. His involvement in conflicts came to petitioners' attention when they learned that Evseroff was the *unnamed* attorney in the *Cancilla* case. Evseroff knew he was the target of a criminal investigation in *Cancilla* before the superseding indictment in the case at bar was filed. Rabin knew of the investigation and knew Evseroff knew of it. The government knew Evseroff was a target and had told him so. "All of Brooklyn knew," *except petitioners.*

After *Aiello II,* petitioners learned of at least three other cases involving Evseroff in conflicts of interest. In a State case, he had represented a defendant, who was convicted and sentenced to 12 to 25 years; a prosecution witness who could have been the actual perpetrator was the client of Evseroff's co-tenant/landlord, and Rabin did a criminal motion on his behalf. Judge Weinstein noted the "disturbing nature" of Evseroff's conflicts also in *United States v. Gambino* (D.N.J. 84-CR-98),[3] and *United States v. Tortorello* (E.D.N.Y. 80-CR-574).

Rabin as Evseroff's employee. Evseroff called Rabin his "employee" or "associate." Rabin was his *de facto* employee for years, being paid, as Judge Weinstein noted, a monthly stipend, extra for appeals, motions, trials and additional time spent on Evseroff's matters. He got extra income from clients Evseroff referred to him where "there were multiple defendants and possible conflicts *** both in the state court [and] the federal court." In this case, Rabin had no file of his own, worked with Evseroff's, and left it in Evseroff's file cabinet when he moved out. He did motions in Evseroff's

[3]The US Attorney has opposed Evseroff representing any client in the District of New Jersey ever since.

name only, and the government always reached him at Evseroff's phone number.[4]

Evseroff/Rabins' representation of co-conspirators. Evseroff was the lawyer and instrumentality of the Ragusa family. He and Rabin had a prior relationship with Filippo ("Tarzan") Ragusa, the fugitive "number one" defendant in this case, and with his son-in-law and co-conspirator Sal, a drug dealer. Evseroff represented Ragusa in 1982 on a drug conviction *in absentia* in Sicily,[5] and Ragusa and Sal on a customs matter in 1983. Ragusa and Sal came to Evseroff's suite often then, as did another drug dealer named Rina. Ragusa paid Evseroff $5000 (later given to Francesca and then to Rabin) on the drug matter. Petitioners had nothing to do with these matters and never met Rabin or Evseroff until after their arrest.

On September 19, 1983, Aiello was arrested and arraigned in Buffalo, later transferred to New York City; Scaduto and Sal were arrested at Ragusa's pastry shop and arraigned in the Southern District. Ragusa, under constant surveillance since early 1983, "pranced out" of the pastry shop with Rita Volpe. Ragusa's daughters Francesca and Maria asked Evseroff to represent all the defendants. He demanded $500,000 for himself and co-counsel, and got $63,000 to represent Sal. He gave Rabin $10,000 cash to represent Scaduto. Rabin appeared for Scaduto and "of counsel" to Evseroff for Sal in the Southern District.

In October 1983 the case was moved to the Eastern

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[4]The government knew, based on information accumulated over the years, that Rabin was in Evseroff's suite.

[5]The government knew during the prosecution of the case at bar, that Evseroff previously represented Ragusa.

District. Sal was dropped for prosecution in State court, but he and co-defendant Salemi were still regarded as co-conspirators. Sal was indicted on two A-I felonies, which Evseroff told him carried a potential maximum sentence of 50 years to life. A superseding federal indictment was filed January 13, 1984, adding "848" counts against Ragusa, Scaduto, and Aiello.

Defense and prosecution regarded the federal and state cases to be essentially the same case. Assistant US Attorney Summers told Judge Costantino it was a "single operation *** covered by different violations of law." He and his partner Cunningham (like Summers, now in private practice) made frequent contact with the State prosecutors, who came to the federal wiretap hearings and were "having the same problems *** establishing the legality of the wiretaps." Summers spoke with them "dozens of times" and claims they would have prosecuted Sal on an 848 count had the State finished its case before the federal trial started. He says that prosecuting Sal on an 848 count remains a viable prospect, that Evseroff knew this, and that the government spurned attempts by his lawyers to get Sal a plea covering both federal and State cases.[6]

On October 31, 1983, in the Eastern District, on behalf of Scaduto, Rabin filed a formal notice of appearance. *See Cuyler, supra* at 352 (J. Brennan). No withdrawal is on record. Rabin represented Scaduto in December 1983 before Judge Costantino. Though he was assigned to represent Francesca in January 1984, he continued as Scaduto's *de facto* lawyer, being obligated, as Evseroff's employee, to do

[6]The fact is, however, that 848 counts were not lodged against Scaduto and Aiello until *after* Sal was dropped from the federal case, and the US Attorney has yet to reinstate federal charges against him.

Scaduto's motions without returning the $10,000 retainer. Evseroff/Rabin represented Sal until after the federal trial. Even after Steven Scaring was substituted for Evseroff, Rabin was present for Sal's plea negotiations.

Rabin was asked to represent Salemi and spoke with him often until May 1984, when a State prosecutor called attention to the conflict between Salemi and Sal. The State judge ordered Rabin off the case[7] but, disregarding the order, Rabin continued *sub rosa*, advising Salemi on his guilty plea prior to the federal trial. Evseroff also spoke with Salemi.

Rabin was asked to represent Francesca after her arrest in 1984,[8] for a fee of $25,000, $10,000 of which was paid by crediting the cash he got to represent Scaduto, plus later cash payments. Rabin represented her through her first appeal.[9]

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[7]In contrast, Rabin had filed a notice of appearance for Scaduto and appeared before Judge Costantino on his behalf, then later appeared for his co-defendant Francesca before Judge Costantino, who said and did nothing about it.

Judge Costantino also knew Evseroff was the lawyer for both Scaduto and Sal. Evseroff told him no less than three times during the course of the trial. The government knew of the multiple representation; Summers calls it "common knowledge."

In addition, before the trial, Letters Rogatory arrived from Italy, requiring the US Attorney to produce Scaduto, Aiello, Sal, Ragusa and others to answer criminal charges arising in Italy from the same allegations in the case at bar. Defense counsel knew of these charges before the trial; Rabin even told Judge Costantino on the record that Italian judges were here conducting inquiries "for at least the last week" and that an Assistant US Attorney had been appointed "special commissioner." Summers, so appointed by Judge Costantino, deposed Scaduto (who needed an interpreter) and Sal, who were both represented by Evseroff at the hearing, and Aiello, who was represented by his counsel in *Aiello I*.

[8]Actually, Rabin's notice of appearance was filed by another of Evseroff's employees, Joseph Levy, a non-lawyer.

[9]The constant shuffling of clients between Evseroff and Rabin succeeded in confusing even co-counsel. Sussman was not sure whether Evseroff or Rabin represented Sal; others thought Rabin did.

Evseroff's recruitment of cooperative co-counsel. To represent the rest of the co-conspirators, Evseroff enlisted attorneys with little or no federal experience (Candelaria, Carnesi, Taub[10]) and his suitemates (Candelaria, Sussman, Rabin), recommended them to the Ragusa family, and set their fees (only Taub denies this), which were never discussed with the clients. Evseroff handled all Candelaria's "financial details" and introduced her to Volpe after first advising Volpe in regard to a grand jury subpoena. Candelaria asked Evseroff to set her legal fee and did not discuss it with Volpe. She admitted that Evseroff, not Volpe, had retained her.[11]

Evseroff brought in Lombardino to replace a lawyer who was representing an informant in another matter, and set his fee. Taub was brought in to replace Aiello's attorney in Buffalo, Ragusa's family fearing Aiello might turn informant. Rabin was sent to Buffalo to oust the prior attorney. Aiello was told the Ragusa family would pay for his lawyer only if it was Taub, who got cash payments even before Evseroff introduced him at MCC, and admits the fee was not discussed with Aiello. Aiello was upset with Taub throughout the case and strongly stated he wanted another lawyer, complaining to Rabin, Maria, and others that Taub did not visit him or discuss the case with him.[12]

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[10]Cunningham, in a letter to the Circuit Court, excluded Taub from a discussion of experienced federal lawyers.

[11]She notarized an affidavit filed in support of the motion for a new trial.

[12]Evseroff brought Auerbach, a Bronx attorney employed by Richman for $400 weekly and a free office in exchange for a third share of all his private and CJA fees, into the case as a CJA. Judge Costantino made several phone calls and appointed him, though the client owned a house and a business. After the trial, he submitted a CJA voucher for $18,000, but Judge Costantino allowed him only $12,000, a third of which he turned over to Richman. Auerbach received free daily copy of pretrial and trial minutes, almost 6000 pages, which "everyone grabbed for." Before the trial ended, Auerbach told Evseroff about

(footnote continued on next page)

As Judge Costantino confessed:

> If I had to look at how all the lawyers are hired in the case I couldn't come out on the bench. I wouldn't be able to live with myself. If I examined how every lawyer was retained I wouldn't come out on the bench. Take that and put it in your pipe and smoke it.

Evseroff's control of legal fees. Defense counsel deny knowing the source of the legal fee monies. Assistant US Attorney Gregory O'Connell indicates it was Ragusa (father of co-defendant Francesca) and Rina who "controlled the purse strings," *Camera v. Fogg*, 658 F.2d 80 (2d Cir. 1981). Ragusa's daughters brought up the first payment but later payments came from the Ragusa's cohorts, Nick Aiello (cousin to Ragusa, no relation to petitioner) and Rina. Packages of cash were brought only to Evseroff or Rabin and distributed only by them. Payments were always turned over to the lawyers at Evseroff's suite, always by Evseroff or one of his employees.

Evseroff had the Circuit Court wondering "how he knew that the money was distributed according to each lawyer's fee arrangement when he has ignorant of what those arrangements were." He kept no ledger or other record of revenues other than bank deposit slips, which fail to identify the sources of cash. Co-counsel say Rabin distributed some payments and knew how much they were.

(footnote continued from preceding page)

his arrangement with Richman. Evseroff told Maria during the trial that he had hired Auerbach, who would start working for him after the trial, and already referred him a Criminal Court. Evseroff brought Auerbach into his suite just after the trial, with the incentive of an arrangement similar to Rabin's. Like Rabin, Auerbach got clients from Evseroff's multiple defendant cases.

Impermissible division of fees. As Judge Costantino observed:

> Isn't it plain here, Mr. Esroth held back $500,000 unless they agreed to certain things which they gave to him; Isn't that so?

Rabin told Ragusa's daughter that Taub, who was to receive $75,000, got only $25,000. Rabin, Sussman and Carnesi were slated for $75,000 but only got $25,000; Lombardino got only $25,000 of his $62,500. Deposition testimony showed that Candelaria received only $14,500 of the $25,000 promised her, and Burke only two thirds of his $25,000 fee. Sussman complained his fee was $3,000 to $5,000 short, and Carnesi received only $15,000 of his $25,000.

To Candelaria, the case was "a learning experience," as to "Evseroff's greed" and "his manipulation of lawyers and clients." Candelaria in person and Burke by telephone admitted a referral fee. At the hearing, Samuel Neuman, a disabled health administrator, testifed he overheard her complaining:

> A [Candelaria] was explaining that she had to give back a certain percentage of the money.
>
> She said, "I have to give back a third of whatever fee is, whatever I got from Mr. Evseroff."
>
> THE COURT: Who?
>
> THE WITNESS: Mr. Evseroff.
>
> THE COURT: You heard her say the word "Evseroff"?
>
> A Yes.
>
> Q Did she mention anything about money to give to Mr. Evseroff?
>
> A She said, "He even stuck me for $40."

Sussman testified similarly:

> Q Did you make any statement *** that could in any way, shape or form have been construed by him to have been to the fact that you returned one-third of your fee for representing Mr. Logalbo to Mr. Evseroff?
> A It is possible. ***

Evseroff's pretrial team. Evseroff organized a team of lawyers and employees, based in his suite and led by Rabin, to handle all pretrial matters. This team included a retired police detective named Boccio, who interpreted for petitioners.[13] In many "ad hoc" meetings at Evseroff's suite, defense counsel discussed various legal issues. Taub, called "taciturn" and "stuffy" by co-counsel, attended none of these meetings; he was based in Queens and had a heavy trial schedule.[14] Discovery materials were delivered exclusively to Evseroff's suite, where Rabin logged them in. The videotapes of Aiello's warehouse were obtained by this team and had to be communicated to Taub, who saw them only a month before trial.

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[13]Aiello hardly spoke English and spoke only Italian. Scaduto spoke a "halting English" and was unable to understand the word or concept of "conflict" without an interpreter. Scaduto needed an interpreter at trial and at the Rogatory depositions. Boccio, sworn as an interpreter twice on the record, says petitioners could not speak English well enough to understand legal concepts. Nevertheless, Taub and Evseroff, who speak no Italian, say they used no interpreter.

[14]Taub began a trial only a month before Aiello's trial. About the same time, Evseroff went to Palermo and Rome, consulted with Ragusa's Sicilian lawyer, "one of the same lawyers involved in the *Gambino* case," and went to Bagheria, Ragusa's hometown.

[15]*People v. Gallina*, 95 A.D.2d 336, 466 N.Y.S.2d 414 (2d Dept. 1983). Summers assumed, from comparing papers received from the State prosecutor concerning the *Gallina* case and papers submitted in the case at bar, that Evseroff had hired the same *Gallina* defense lawyer, Steven Scaring.

Prior to his retainer by Francesca and while he was still representing Scaduto, Rabin did legal research and made motions for all the defendants. Rabin's "assignment" and "obligation" as Evseroff's "lawman" was to review the warrants and the wiretap orders on the issue of standing and to draft a discovery letter, which he did on the request and consent of "everybody," including Taub. He researched and prepared a motion, pressed on Sal's behalf but submitted for everyone in the federal case, which relied on *Gallina* to attack two Salemi wiretaps and led to several suppression hearings.[16]

The warehouse videotape—pretrial. In time, however, Rabin tired of his pretrial duties and approached co-counsel for money. He made no motion on the videotape because he was swamped with work on the other issues, was getting no help or compensation from co-counsel and, after Francesca Bartolotta's arrest, was concentrating on her case, which did not involve the videotape. Rabin says "anybody who was on the videotape would have an interest in bringing a motion to suppress," and *on the record* (with Taub present representing Scaduto, not Francesca) before Judge Costantino in December 1983 argued that the government's "entire case basically is the video." He recalls no one raising the videotape as an issue, except at trial, and may have never seen the videotape orders, though he was "going over the orders" and had "gone over the videotapes."

Other lawyers whose clients appeared on the videotape made no motion to suppress. Taub, whose client owned the

[16]Although by March 5, 1984, 167 days had elapsed since the petitioners' arrest, no speedy trial motion was made. Likewise, Taub and Evseroff made no written motion for severance.

warehouse and whose unsigned name appears on a pretrial motion to suppress the videotape as "tainted" under *Gallina*, says he never discussed a videotape motion with Rabin, saw no videotape order at any time, is not sure there even *was* such an order, and says he *made no written motion*. Evseroff recalls "Rabin making motions in connection with this," and says Rabin's "obligation *** was to draw the motion for everybody." Therefore, Taub's "taint" motion may have been prepared without his knowledge.[17]

No motion was made, by Taub, Evseroff or anyone else, to suppress the videotape on that grounds that it violated the Fourth Amendment or Title III or its rationale. On the "taint" motion, a supporting memorandum discussed Title III, but only as to whether it authorizes break-ins like the one to Aiello's warehouse and Ragusa's pastry shop, and argued that legislative history and Fourth Amendment considerations should sway the trial judge to overrule *Scafidi*.[18] It also raised noncompliance with the break-in orders, treating the video order as a "search warrant" instead of a wiretap. Ignored was the issue that lies at the heart of Title III and eavesdropping and wiretap orders—the feasibility of normal investigative methods.[19] As Judge Weinstein observed in oral argument, "every defense lawyer would normally make such a motion, *** just a way to go behind the court order to see whether there is a basis."

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[17]The notice of motion and Taub's affirmation were apparently typed on the same typewriter as Rabin's affirmations.

[18]*United States v. Scafidi*, 564 F.2d 633 (2d Cir. 1977).

[19]The defense was not alerted by a wiretap ruling pretrial: "The motion by all defendants to suppress wire tap evidence on the grounds that the wire tap application for Salemi number one failed to establish that *normal investigative techniques* were exhausted, is denied" (emphasis supplied).

In pretrial proceedings, Taub argued the "taint" motion, but made no mention of Title III or the Fourth Amendment and no other objection or motion to suppress on the grounds raised in *Aiello I*.[20] Neither Taub nor Evseroff, who calls himself a "trial man, not a motion man," believed a suppression motion was appropriate, Evseroff incorrectly concluding that Scaduto lacked standing. *Alderman v. United States*, 394 U.S. 165 (1969). Judge Costantino denied Taub's motion to suppress but did not preclude later motions, saying:

> There may be other motions that have to be made in this case. Any other motions, if they are not heard now, will be heard sometime during the trial, if you happen to think of one. *** A lot will become perfunctory, and when that time comes, I will say take your exception and save it for your appeal.[21]

The warehouse videotape—at trial. The videotape was perhaps the government's most potent piece of evidence and certainly the most harmful to Aiello. It was referred to in opening statements and was the subject of a motion by WABC-TV to obtain and broadcast it. The government produced the witness who had installed the video equipment in the warehouse. Evseroff pointed out that "the order for the video taping didn't ask, didn't seek sound." Taub orally moved to suppress on the ground that the lack of sound made the videotape more prejudicial than probative, which Judge

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[20]As the Circuit Court observed, Taub's motion "argued that the court authorization for videotaping at the warehouse was based in part on the fruits of the allegedly unlawful wiretap ***. Aside from this there was no motion to suppress the videotaped evidence on constitutional or other grounds."

[21]The Circuit Court in *Aiello I* held that the nature of Taub and Evseroff's objections at trial failed to preserve the Title III and constitutional questions.

Costantino denied and the Circuit Court rejected in *Aiello I.*

The witness testified that sound equipment was not installed because the acoustics were bad and microphones or transmitters were difficult to install. The government tried to elicit that sound would have required a Title III order, which would have been too time-consuming. In a lengthy sidebar, Judge Costantino said he did not know what Title III was. The prosecutors called the video order a "search warrant," not involving Title III, and said "sound has to be done under the statute, video doesn't." No one disagreed; Taub was mum throughout.

The witness testified to the "so-called search-warrant order" and agreed that getting authorization for sound could have taken only two hours. The government stipulated that no authorization for sound was sought. Sound equipment was not installed, the witness admitted, *not* because of acoustical or other practical considerations but because authorization was never sought. Still Taub and Evseroff made no Title III or constitutional objections. Evseroff instead raised the lack of a foundation, and Taub repeated that the prejudice outweighed the probative value. Neither lawyer even mentioned the videotape in his terse Rule 29 motions.

Both Taub and Evseroff *swore* that the videotape was damaging, indeed devastating, to their clients, that it would have been better for their clients had the tape *not* been in evidence and that it was not their tactical decision to let it in.*

*At oral argument following the hearing in the court below, Assistant US Attorney O'Connell said, "I can't imagine how [the tape] would be viewed as helpful to either Scaduto or Aiello's case."

Some lawyers felt the videotape was the turning point of the whole case. Burke played portions of it so his client could clarify the ambiguous activities shown on it. Carnesi produced an expert to prove that sound could have been monitored. The government cross-examined as to Title III and asked specifically about soundless video, which the expert insisted is:

> *** definitely done under the wiretap statute. ***
> I'm not a lawyer but I'm sure.

Even this testimony did not move Evseroff or Taub to object to the videotape on Title III grounds. Only two pages of Taub's 24-page summation and a part of one page of Evseroff's 25 pages touched on the videotape. In contrast, the government played a portion of the videotape in its summation and spent almost half of its 12-page rebuttal discussing it.

Evseroff as "trial leader." Evseroff was regarded by the lawyers and the judge as lead defense counsel, and the trial record confirms this. With one notable exception, it was Evseroff who substituted for absent lawyers during the trial,[22] drawing unnecessary attention to Scaduto.[23] Judge Costantino warned Evseroff not to raise objections or conduct

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[22]Candelaria indicated she could not be present for testimony regarding tapes of a telephone call from "Evseroff's client" to Volpe, and thought it inappropriate for Evseroff to stand in, as it "would present a potential conflicting situation." While surprising for its rare reference to the issue of conflicting interests, it is noted here to illustrate that Evseroff, as lead defense counsel, was assumed the first choice to stand in.

[23]Standing in for Lombardino, Evseroff asked Judge Costantino to advise the jury he was doing so and then calling unnecessary attention to Scaduto:

> THE COURT: ***. Now, just in retrospect, Mr. Lombardino is not here, but Mr. Evseroff at this time with the consent of Mr. Lombardino is representing Mr. Altamura.
>
> MR. EVSEROFF: As well as my own client.

examination not pertinent to the defense of his own client.[24]

At first Evseroff represented Sal and Rabin had Scaduto. With Ragusa a fugitive, Scaduto became the first named defendant on trial. In taking over Scaduto's defense, Evseroff was able to remain lead defense counsel, and to open first and examine first. When the superseding indictment added Francesca as the last named defendant, Rabin was assigned to defend her, and thus allowing him to open and examine last. The tandem of Evseroff and Rabin thus had the first and last word on every witness.

Failure to call witnesses: Evseroff referred to potential defense witnesses as "our people." He felt all defendants should testify. He approached Francesca without Rabin's consent and told her he planned to call her to the stand, but he did not let Scaduto testify.

Aiello wanted to testify, but Taub would not let him. After seeing the warehouse videotape, Evseroff believed Aiello "didn't have a prayer unless he got on the stand and explained what was going on there," and told Taub Aiello wanted to testify. Taub asked co-counsel whether Aiello should testify, but Aiello was not present for these discussions. Petitioners did not take the stand and were convicted. As many have observed, all defendants who testified were acquitted.

At the end of the government's case, the indictment against Volpe was dismissed. As Ragusa's mistress and waitress-cashier at his pastry shop, she knew where Ragusa was and

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[24] Judge Costantino encouraged defense counsel to agree on who would examine the various witnesses, saying: "No one has to be afraid they don't have the prominence of being the trial leader ***."

knew about airline reservations made to Buffalo for Scaduto, which was part of Scaduto's defense. Evseroff says that Volpe's testimony *would have helped Scaduto* and that she would have been a good witness, and even before the dismissal recommended that she testify. After the dismissal, Volpe would have been unable to invoke the Fifth Amendment, yet Evseroff did not put her on the stand.

Lina Picozzi was hired by Evseroff to make defense-version Sicilian transcripts and English translations of them. The exact meaning of certain conversations was at issue, the government claiming that certain words referred to "heroin," "Godfather," and "pallet," the defense contending that the words meant that a "godfather" in the religious sense "has arrived OK" to see about "a small racehorse." The defense versions were never submitted to the jury; only the government's were.[25]

No confrontation of witnesses. No defense lawyer called Salemi. Many of the undercover's conversations with Sal occurred in Salemi's apartment. Moving to strike hearsay statements attributed to Salemi and introduced through the undercover, Rabin argued that confronting Salemi would have profited the defense, calling him a declarant available to the government and criticizing the prosecution for not producing him, when all the while Salemi was available to the defense and never called. Nonetheless, the government's introduction of Salemi's hearsay statements without first showing his unavailability was in violation of petitioners' Sixth Amendment right to confrontation and cross-examination.

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[25]This was fatal, by design or blunder. Judge Costantino had ruled earlier that, since most of the conversations in evidence at trial were not in English, transcripts would be provided to the jury but minutes of cross-examination would not.

Petitioners insist that they wanted Sal called. Rabin notes a potential benefit to Scaduto in having Sal testify and Evseroff claims he "suggested but did not recommend" Sal testify. Evseroff indicates Sal might have exculpated Scaduto on the question of whether the *codename* "Lorenzo" found in the Bartolotta notebook meant Scaduto.[26] Burke says co-counsel should have shifted more culpability onto Sal than they did. No one called Sal, who was willing to take the stand. Had anyone done so, Evseroff says he would not have let him testify and would have told him to invoke the Fifth.[27] The introduction of Sal's hearsay statements without first showing his unavailability denied petitioners' Sixth Amendment right to confrontation and cross-examination.

The notebook. Since Sal was never called by Evseroff or subpoenaed by any other lawyer, and thus never required to take the Fifth, his unavailability was never shown. Nevertheless, the notebook found, *not* on Scaduto or in *his* house, *United States v. Garcia-Duarte*, 718 F.2d 42 (2d Cir. 1983), but in the Bartolotta house was admitted into evidence on the government's direct case. The notebook, naming a "Lorènzo" who Scaduto claims is not him, provided the sole basis for the

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[26]Some of the other codenames were "Tarzan," "Sal," "Edi," "Mike," "Aldo," "Ciarli," "Gino," and "Cic."

In summation, all Summers could say was:

> " *** right under Tarzan, right underneath the King of the Jungle, ladies and gentlemen, on the back page which shows the payout, is the name Lorenzo. There is no evidence in this case, ladies and gentlemen, that that indicates anything other than that Lorenzo, the man sitting right over there at that table with the white jacket on, Lorenzo Scaduto, and just under Tarzan, the name Lorenzo, and just under that the amount of money Tarzan received."

Evseroff said *absolutely nothing* on "Lorenzo" or the notebook.

[27]Had Sal been called to the stand, Evseroff would have stood up as his lawyer, and Judge Costantino would have been compelled, by the obvious potential conflict of interests, either to follow Rule 44(c) or to order Evseroff off the case entirely, at the risk of his legal fees.

848 count.[28] The government noted in *Aiello I* that Rabin resolved the question as to whether the notebook actually belonged to "co-conspirator Salvatore Bartolotta" in the cross-examination of government witnesses. Specifically, Rabin, without objection or severance motion from Evseroff, elicited from an FBI agent the *lay* opinion that the handwriting in the notebook appeared to be Sal's[29] and, from another FBI agent, Francesca's statement that the notebook was her husband's. The government, knowing the notebook's importance, gave copies of it to the jury prior to its summation, in which the notebook was repeatedly mentioned.

Francesca's statement that the notebook must be her husband's was a hearsay statement *not* made in furtherance of the alleged conspiracy. Though obviously damaging to her husband, Sal was not a defendant or witness in the federal trial. It was Scaduto who was on trial, and that statement of his co-defendant Francesca was being used against him, in violation of his Sixth Amendment right of confrontation under *Davis* and *Bruton, infra.*

Convictions and sentences. Scaduto was found guilty on all counts, including the 848, and sentenced to a total of 64 years. In contrast, after the federal verdict Sal, with Rabin present,

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[28]The notebook was crucial, not only on the "fourth essential" in the jury charge (managing five or more persons) but also on the "fifth essential" (obtaining substantial resources or income), which was the last matter the jury wanted clarified before announcing its verdict.

[29]Thus Rabin relieved the government of having a handwriting expert identify who wrote the entries in the notebook, which were printed in black letters, not cursive script.

THE COURT: If it is found inside it is attributable to the person whose premises it was found.

I don't make these rules. These are the rules I have to follow. I don't make them. I'm not going to change them. I will tell you right now I am not stretching the rules one way or another. I am just not doing it."

pled guilty and was sentenced to the *minimum* sentence of only 15 years to life; the whereabouts of Evseroff's first client, Ragusa, were never exposed, and his daughter Francesca received only a five-year sentence.

Aiello was found guilty of conspiracy and importation and sentenced to a total of 26 years. Taub and Evseroff reserved but never made post-verdict motions. Taub offered his services for Aiello's appeal, but Aiello turned him down. Evseroff instead recommended the firm of Fischetti Feigus & Pomerantz for Scaduto,[30] and Gerard Lynch for Aiello,[31] with Rabin handling Francesca's appeal.[32] No request for Taub's assistance on the appeal was never made.

Motion to expand the remand. Besides indicating that he would have granted a new trial, Judge Weinstein at oral argument, with the foregoing evidence before him, recognized the conventional wisdom in attacking the videotape order and acknowledged the lapses in representation of the petitioners but nonetheless suggested that the claimed ineffective assistance of counsel did not arise from the obvious conflicts of interest, and urged petitioners to move the Circuit Court to expand the remand to permit him to consider all the evidence, not just the questions of Sal as a witness and the division of fees. He refused to entertain a motion to renew based on the

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[30]Fischetti, recommended by Evseroff, was the lawyer who substituted for Rabin when he was ordered off *Gambino*. Evseroff told him of his multiple representation of Scaduto and Bartolotta, and the government mentioned it in its brief in *Aiello I*, but Feigus' initial and reply briefs for Scaduto said nothing of this.

[31]Feigus stood with Lynch at Aiello's Rogatory deposition.

[32]Rabin received $7500 to $10,000 ($5000 received from Evseroff through Francesca) of the agreed retainer of $25,000, the balance being due if the appeal were successful, thus an impermissible contingent fee. DR 2-106(C), EC 2-20, *Code of Professional Responsibility*.

additional evidence, so a motion was made for an order compelling or permitting Judge Weinstein to consider all the evidence, whether or not directly attributable to a specific conflict of interest, on the assertion that the original Rule 33 motion for a new trial was not restricted to those two issues and that, in the interests of justice, all the evidence should be considered. The motion was denied (Appendix I) in a terse and belated order entered after Judge Weinstein had already issued a written decision on the motion for a new trial.

Judge Weinstein's order. His order (Appendix C) and judgment (Appendix B) now found petitioners' trial counsel "met minimal standards of competency,"[33] implied that the Title III motion would have been "fruitless," and denied the motion for a new trial, nonetheless finding the "appearance of impropriety," noting Evseroff's "delicts" and the "disturbing nature" of his conduct in prior cases, enumerating "suggestions for the future"[34] as to cash fees and referrals to suitemates, "related case" and granting a "certificate of probable cause."

The appeal below. On appeal, both petitioners joined in each other's briefs. Aiello adopted his argument in *Aiello I*, now with the benefit of the subsequent holding in *United States v. Biasucci*, 786 F.2d 504 (1986), *cert. denied*, — U.S. —, 107 S.Ct. 104, that the videotaping of his warehouse was unlawful and unconstitutional. He argued that he did not waive his constitutional objection to the videotaping, on the grounds that Taub made no affirmative use of it, that the record now showed that the underlying order ignored the

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[33]Contrast the higher standard of "reasonably effective assistance" enunciated in *Strickland, supra* at 687.

[34]Not yet having the precedent of *Wheat, infra*, Judge Weinstein applied ethical standards only as a warning to the bar and not with the force of law.

issue of necessity,[35] and that Taub had abdicated to Rabin and Evseroff's pretrial exam—out of incompetence, *Strickland, supra,* or the control exerted by Evseroff or the Ragusa family, *Cuyler, supra*—his duty to research the facts and law.

Scaduto maintained that Fifth and Sixth Amendment rights were violated because he was never given the opportunity to make intelligent and knowing waivers of his right to a conflict-free attorney, *United States v. Cataldo,* 625 F.Supp. 1255 (S.D.N.Y.), *United States v. Curcio,* 680 F.2d 881 (2d Cir. 1982), and *Solina v. United States,* 709 F.2d 160 (2d Cir. 1983), *Cancilla, Strickland, Holloway, Cuyler, supra,* and DR 5-105(C), *Code of Professional Responsibility.* He was denied the right to confront his lawyers' other clients Francesca, Sal and Salemi, *Davis v. Alaska,* 415 U.S. 308 (1974), *Bruton v. United States,* 391 U.S. 123 (1968), and to be heard at his resentencing, *Green v. United States,* 365 U.S. 301 (1961), *Hill v. United States,* 368 U.S. 424 (1962), Rule 32(a)(1).

In their joint Reply brief, petitioners, relying on *Wheat v. United States,* 56 U.S.L.W. 4441 (1988), pressed the point that they have been urging for the three years that have passed since the motion for a new trial was first made, namely, that the breaches of ethics mandated a new trial and were not merely the concern of bar associations and grievance committees. Ignoring *Wheat,* the Circuit Court (Appendix A) characterized many of petitioner's arguments, without saying which, as being "beyond the scope of the remand," refused to consider the evidence assembled as a result of the inquiry it

[35]Copies of the order, the application for it, the supporting affidavit and the required authorization letter were submitted to Judge Weinstein and the Circuit Court. None cited the necessity of videotaping, in lieu of normal investigative procedures.

had ordered and the successive motion granted before Judge Weinstein's determination on the merits, and affirmed "substantially for the reasons stated" in Judge Weinstein's opinion.

CONCLUSION

Had the petitioners been told in advance that Evseroff represented the Ragusa family and was being investigated by the very same US Attorney prosecuting the petitioners; that Evseroff would have exclusive control of the legal fees and would dominate the defense; that Rabin was Evseroff's employee; that Taub was brought into keep Aiello from turning informant; that tenable severance and suppression motions would not be made because of Evseroff's trial *hubris* and Taub's undue reliance on Rabin and other suitemates; that a notebook would be introduced with help from the defense; that their lawyers would meet only minimum standards of competency; that the conduct of their lawyers would create the appearance of impropriety; that defense transcripts of key conversations would not be introduced into evidence; that certain admittedly helpful witnesses would not be called to the stand because, if called, they would have indicated Evseroff was their lawyer and thus caused him to be relieved as defense counsel; that they would be denied the right to confront three of Evseroff/Rabin's clients whose statements were used against them at trial; that their lawyers would pull punches in their defense to curry favor with the US Attorney or the Ragusa family; and that no defense attorney or prosecutor or trial judge was going to fulfill his affirmative ethical duty to point out their constitutional rights, one can certainly say petitioners, two Italian-speaking US citizens without prior criminal records, finding themselves in jail facing the severest of drug charges, would have

thought twice about who their lawyers were, or at least should have been given the opportunity, whether under Rule 44(c), the Sixth Amendment, or the fundamental principles of fairness embodied in the Fifth Amendment, to hear what all of Brooklyn knew and make a knowing and intelligent choice of counsel.

In sum, the evidence adduced since the remand has not enlarged the issues, only the proof of petitioners' original contentions, and the courts below simply found excuses to disregard it, reserving for the future their disturbance at the breaches of ethics. Petitioners ask the Court to examine this case, as it did in *Wheat,* in the interest of preserving the confidence of the public in the integrity of the legal system.

APPENDIX A

RJC

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Weinstein

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 21st day of October, one thousand nine hundred and eighty-eight.

Present:

HONORABLE J. EDWARD LUMBARD
HONORABLE RICHARD J. CARDAMONE
HONORABLE LAWRENCE W. PIERCE

Circuit Judges

United States Court of Appeals
Filed
October 31, 1988
Elaine B. Goldsmith, Clerk
Second Circuit

UNITED STATES OF AMERICA,

Defendant-Appellee,

—against—

ANDREA AIELLO a/k/a ANTONIA AIELLO and LORENZO SCADUTO,

Petitioners-Appellants.

ORDER
Docket No.
88-2140

Andrea Aiello and Lorenzo Scaduto appeal from the February 29, 1988 decision and order of the United States District Court for the Eastern District of New York (Weinstein, J.) denying their petition to set aside their conviction.

This case is before us for the third time. Petitioners were convicted of heroin importation and distribution charges in 1984. We affirmed those convictions in *United States v. Aiello* (*Aiello I*), 771 F.2d 621 (2d Cir. 1985). Following denial of petitioners' motion for a new trial on the ground of newly discovered evidence, we remanded for assessment of petitioners' claims of ineffective assistance of counsel caused by conflict of interest. *United States v. Aiello* (*Aiello II*), 814 F.2d 109 (2d Cir. 1987). We directed the district court to examine, first, the fee arrangement of petitioners' lawyers to see if attorney Evseroff had controlled other defense counsel to the extent that he had *de facto* represented co-defendants, and thereby created an impermissible conflict. Second, the district court was directed to ascertain whether "Mr. Evseroff had an actual conflict of interest in representing both Scaduto

and Salvatore Bartolotta," focusing on the absence of Bartolotta's testimony at trial. (*Aiello II*, 814 F.2d at 114).

Petitioners appeal the findings made pursuant to our remand. Arguments raised beyond the scope of the remand are not properly before us. Hence, we do not consider them.

We affirm substantially for the reasons stated in Judge Weinstein's thorough opinion dated February 29, 1988.

The order of the district is affirmed.

J. Edward Lumbard, U.S.C.J.

Richard J. Cardamone, U.S.C.J.

Lawrence W. Pierce, U.S.C.J.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

APPENDIX B

Filed
in Clerk's Office

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---X

UNITED STATES OF AMERICA

—against—

ANDREA AIELLO, a/k/a ANTONIO AIELLO and LORENZO SCADUTO,

Petitioners.

---X

JUDGMENT
CR 83-429 (JBW)

A memorandum and order of Honorable Jack B. Weinstein, United States District Judge, having been filed on March 2, 1988, denying the petitioner's motion to set aside the judgments of conviction pursuant to 28 USC § 2255, and granting the issuance of a certificate of probable cause, it is

ORDERED and ADJUDGED that the petitioners take nothing of the respondent; that the petitioners' motion to set aside the judgments of convictions is denied; and that the issuance of a certificate of probable cause is granted.

ROBERT C. HEINEMANN
Clerk of Court

Dated: Brooklyn, New York
March 3, 1988

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

—against—

ANDREA AIELLO, a/k/a ANTONIO AIELLO
and LORENZO SCADUTO

Petitioners

MEMORANDUM
AND ORDER
83-CR-429

APPEARANCES

Andrew J. Maloney
United States Attorney
By: Gregory J. O'Connell
Assistant U.S. Attorney
U.S. Dept. of Justice
225 Cadman Plaza East
Brooklyn, New York 11201

Attorneys for the United States

William E. Lore
118-21 Queens Boulevard
Forest Hills, New York 11375

Attorney for Petitioner Andrea Aiello

Michael Vincent Ricci
11-01 154th Street
Whitestone, New York 11357

Attorney for Petitioner Lorenzo Scaduto

WEINSTEIN, Ch. J.:

Defendants Andrea Aiello, Lorenzo Scaduto, and Francesca Bartolotta were convicted in July of 1984 following trial on various charges of importation and distribution of heroin and conspiracy to import and distribute heroin. Five other defendants were acquitted. The conviction was affirmed on direct appeal in *United States v. Aiello,* 771 F.2d 621 (2d Cir. 1985).

Defendants then moved for a new trial in February of 1986 based on the alleged discovery of new evidence tending to prove prejudicial attorney conflicts of interest. The district court treated the motion as a writ of habeus corpus, 28 U.S.C. § 2255, and denied it without a hearing. The Court of Appeals reversed the denial on the ground that the appellants were entitled to a fuller inquiry into their claim, and remanded the matter to the district court for further proceedings. *United States v. Aiello,* 814 F.2d 109 (2d Cir. 1987). The trial judge then recused himself and the matter was assigned to another judge by random selection.

Ms. Bartolotta subsequently withdrew her petition. She had already been released from incarceration.

I. Facts

Federal and state agents arrested Mr. Scaduto, Mr. Aiello, and Salvatore Bartolotta in September 1983 in connection with a heroin importation and distribution scheme. Filipo Ragusa, whom agents believed to be the ringleader of the operation, escaped arrest and remains a fugitive. Ms. Bartolotta and Rita Volpe were arrested and indicted several months later. A superceding indictment filed in February, 1984 named Mr. Scaduto, Mr. Aiello, Mr. Ragusa, Ms. Volpe, Ms. Bartolotta, and five others in various counts of heroin importation and distribution and conspiracy. Federal charges were dropped against Mr. Bartolotta, who had originally been indicted in the federal proceeding; he was charged in state court and convicted there upon a plea together with another implicated person, one Charles Salemi.

Most of these defendants are closely related or socially connected. Mr. Ragusa is the father of Francesca Bartolotta, wife of Salvatore Bartolotta, and of Maria Scaduto, wife of Lorenzo Scaduto. Defendant Michael Ducato is Mr. Aiello's nephew. Defendants Domenico Logalbo and Pietro Graffeo are godfathers to one another's children. Mr. Logalbo and Mr. Ragusa are cousins. Ms. Volpe is Mr. Ragusa's girlfriend. Defendant Michele Altamura was Mr. Ragusa's landlord.

Shortly after the initial arrests, the two sisters—Francesca and Maria—approached Jacob Evseroff, Esq., and asked him to represent all of those who had been arrested in connection with the drug ring. He agreed to represent Mr. Bartolotta, and recommended a number of other attorneys to represent the other defendants. After federal charges were dropped against Mr. Bartolotta, the two women asked Mr.

Evseroff to represent Mr. Scaduto, which he agreed to do, while at the same time continuing to represent Mr. Bartolotta in the state proceeding.

Among the attorneys to whom Mr. Evseroff referred the other defendants were Jeffrey Rabin, Esq. Arnold Taub, Esq., Raymond Sussman, Esq., and Maria Candelaria, Esq. Mr. Rabin was in effect, if not in name, of counsel to Mr. Evseroff in his defense of both Mr. Bartolotta in the state proceeding and Mr. Scaduto in the federal proceeding; Mr. Taub was retained to represent Mr. Aiello; Mr. Sussman represented Mr. Logalbo; and Ms. Candelaria represented Ms. Volpe. Mr. Rabin, Mr. Sussman, and Ms. Candelaria shared Mr. Evseroff's office suite at the time of trial. Mr. Rabin had worked for Mr. Evseroff until 1985 in the law firm of Evseroff & Sonenshine, and although the employment relationship was officially discontinued at that time, Mr. Rabin continued to receive from Mr. Evseroff a $400 minimum weekly stipend, free office space, free secretarial services, and telephone privileges in exchange for services provided to Mr. Evseroff. Paul Auerbach, Esq., who was appointed by the court as counsel for the indigent co-defendant Angelo Golio, moved into Mr. Evseroff's suite a month after the district court trial ended.

At the time Ms. Scaduto and Ms. Bartolotta agreed to retain Mr. Evseroff and the other attorneys, they allegedly brought a bag of cash to Mr. Evseroff's suite which they intended for him to distribute to co-counsel. Ms. Scaduto alleges that all fees were thereafter paid only to either Mr. Evseroff or Mr. Rabin, although Mr. Taub states that he was paid directly on several occasions. Mr. Rabin stated in his deposition that the cash brought to Mr. Evseroff's suite was distributed among co-counsel by separating it into piles

containing bills of various denominations, each fastened with a rubber band and marked with a slip of paper containing an attorney's name.

The trial resulted in the conviction of Mr. Aiello, Mr. Scaduto, and Ms. Bartolotta and the acquittal of five other defendants. The charges against Ms. Volpe were dismissed on a Rule 29 motion. All of those who were acquitted had taken the stand, and those who were convicted had not. Neither Mr. Bartolotta, Mr. Salemi, or Ms. Volpe were called to testify for any of the defendants.

The chart below outlines the relationships among the defendants and the disposition of their cases:

DEFENDANTS CHARGED IN FEDERAL COURT

Defendant	*Relationship to Other Defendants*	*Attorney*	*Status*
Filipo Ragusa	Father of Francesca Bartolotta; father-in-law of Salvatore Bartolotta and Lorenzo Scaduto	None	Fugitive
Lorenzo Scaduto	Son-in-law of Filipo Ragusa; brother-in-law of Salvatore and Francesca Bartolotta	Evseroff	Convicted
Andrea Aiello	Uncle of Ducato	Taub	Convicted
Domenico Logalbo	Godfather of Pietro Graffeo's children; Cousin of Filipo Ragusa	Sussman	Acquitted

Defendant	*Relationship to Other Defendants*	*Attorney*	*Status*
Pietro Graffeo	Godfather of Domenico Logalbo's children	Carnesi	Acquitted
Michele Altamura	Landlord of Filipo Ragusa	Lombardino	Acquitted
Michael Ducato	Nephew of Andrea Aiello	Burke	Acquitted
Angelo Golio	None indicated	Auerbach	Acquitted
Francesca Bartolotta	Wife of Salvatore Bartolotta; daughter of Filipo Ragusa	Rabin	Convicted
Rita Volpe	Girlfriend of Filipo Ragusa	Candelaria	Dismissed
Salvatore Bartolotta	Husband of Francesca Bartolotta; son-in-law of Filipo Ragusa	Evseroff	Pleaded in State Court

The trial court was not informed that (1) several of the co-defendants' attorneys were sharing office space, (2) the fees of all defense counsel were for the most part being drawn from cash distributed by Mr. Evseroff; (3) defense counsel had been selected on Mr. Evseroff's recommendation; or (4) Mr. Evseroff and Mr. Rabin were involved in the defense of Mr. Bartolotta in state court.

II. Issues for Review

The court of appeals outlined two major areas of conflict of interest. The first involves petitioners' accusations of corruption stemming from the manner in which counsel fees were distributed. Defendants claim that the fee arrangement allowed Mr. Evseroff to control co-counsel both by giving him excessive input into who was to be appointed to represent the co-defendants, and by allowing him to use the threat of withholding fees as leverage to ensure that co-counsel cooperated with his chosen defense strategy throughout the trial. There was also disagreement regarding the amount of the original lump sum payment—Ms. Scaduto claims that it was $500,000, while Mr. Evseroff claims that it was substantially less—and regarding the defendants' allegations that Mr. Evseroff's co-counsel paid kickbacks to Mr. Evseroff in exchange for the referrals. The court of appeals presented this issue in terms of four factual questions to be resolved on remand: who paid trial counsel, how much counsel received, whether fees were withheld, and whether fees were divided as a form of referral fee. *See* 814 F.2d at 112, 114.

A second issue revolves around allegations that Mr. Evseroff's joint representation of Mr. Bartolotta and Mr. Scaduto, coupled with his alleged control over the other defendants' attorneys, resulted in none of the attorneys being willing to call Mr. Bartolotta as a witness at trial. The evidence is in conflict over whether the defendants wanted Mr. Bartolotta to testify: Mr. Scaduto and Mr. Aiello insist that they asked their attorneys to call him but that Mr. Evseroff refused because Mr. Bartolotta might get "50 years to life," while Mr. Evseroff and Mr. Taub aver that their clients did not want Mr. Bartolotta to take the stand. None of the

petitioners' affidavits indicate what Mr. Bartolotta's testimony would have been, and the attorneys cite tactical reasons for the failure to call him as a witness. The specific questions which the court of appeals ordered decided on remand are whether petitioners wanted Mr. Bartolotta to testify, and whether the defense counsel did or did not want him to testify, and if not, why not. *See* 814 F.2d at 111-12, 114.

At the hearing, petitioners added to their claims by contending that their sixth amendment rights were violated by certain other lapses in the quality of their defense, among them (1) the failure of Mr. Evseroff to call Ms. Volpe as a defense witness for Mr. Scaduto, allegedly because of her knowledge of Mr. Ragusa's whereabouts; (2) failure of either attorney to call as a witness Mr. Salemi, who had pleaded guilty in state court; (3) failure of both Mr. Evseroff and Mr. Taub to move to supress an incriminating videotape showing heroin transactions taking place in Mr. Aiello's warehouse in Buffalo; (4) failure of either attorney to make a speedy trial motion; (7) failure to introduce into evidence alternative versions of translations of certain wiretap transcripts, although the defense attorneys had access to such alternative versions; (8) inadequate cross-examination and summation on matters involving Mr. Ragusa and Mr. Bartolotta; and (9) failure of either attorney to make written post-conviction motions.

Finally, petitioners claim that Mr. Evseroff failed to inform them of prior investigations of him for possible conflicts of interest in a number of other criminal matters. They argue the investigations in those matters—among them *United States v. Tortorello* (E.D.N.Y. 80-CR-574), *United States v. Cancilla,* 725 F.2d 867 (2d Cir. 1984), and *United States v. Gambino* (D. N.J. 84-CR-98)—establish that such conflicts were a general practice in Mr. Evseroff's office.

III. Standards for Assessing Conflicts of Interest

In its decision remanding the petitioners' case for hearing, the Court of Appeals reiterated the standard for assessing conflicts of interest established in *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708 (1980). There the Supreme Court held that "[i]n order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." (Footnote omitted.) This standard has been interpreted to require that a defendant show first, that some plausible defense tactic or strategy might have been pursued but was not, and second, that this defense was inherently in conflict with counsel's other loyalties. *See, e.g., Oliver v. Wainwright*, 782 F.2d 1521 (11th Cir.), *cert. denied*, 107 S.Ct. 313 (1986); *United States v. Fahey*, 769 F.2d 829 (1st Cir. 1985). When failure to undertake a possible line of defense constitutes a realistic tactical choice rather than a reflection of loyalty to another client, the failure does not establish the basis for a claim of ineffective assistance of counsel. *See, e.g., Smith v. Regan*, 583 F.2d 72 (2d Cir 1978); *Perez v. Harris*, 459 F.Supp 1141 (S.D.N.Y. 1978), *aff'd*, 603 F.2d 214 (2d Cir. 1979). Thus, in the case at bar, since the petitioners did not raise their conflict of interest claims at trial, they must show both that the defense tactics which were not pursued, including the calling of Salvatore Bartolotta as a witness, would have been plausible in light of surrounding circumstances, and that counsel's failure to employ them was a result either of the alleged unethical fee or other arrangements or of loyalty to Mr. Evseroff's other client, Mr. Bartolotta.

IV. **Findings of Fact**

The trial judge, who had the opportunity to evaluate the effect of counsel's conduct based on first-hand knowledge, concluded in his memorandum and order dated June 6, 1986 that no violation of defendants' sixth amendment rights had occurred as a result of a conflict of interest. All of the evidence taken in connection with the hearing after remand supports his conclusion. Although the conduct of the defense attorneys at times created the appearance of impropriety, petitioners have failed to establish the existence of an actual conflict of interest in accordance with the *Cuyler* standard.

The mere possibility that a conflict may have affected a defendant's representation is insufficient to impugn a criminal conviction. *Cuyler*, 446 U.S. at 350, 100 S.Ct. at 1719. The petitioners have shown that some potential conflicts existed, and have also set forth a number of plausible defense tactics that might have been pursued and were not, but they have failed to show that these alleged facts were or could have been in any way connected. None of the defense strategies which could actually have been pursued would have worked adversely to the interest of some clients but not others, and thus none of these alleged lapses could logically have resulted from counsel's favoring one client over another. The few defense tactics suggested by petitioners which might have resulted in a conflict could not in any event realistically have been used at trial. Beyond a reasonable doubt, no conflict and no action or inaction of trial counsel complained of by petitioners had any effect on the outcome of the case.

A. Issues Regarding Counsel Fees and their Effect on Relationships Among Co-counsel

Mr. Taub, who represented defendant Aiello, was not under the control of Mr. Evseroff as the petitioners have claimed. He made decisions on behalf of Mr. Aiello wholly independent of any relationship with other attorneys, including Mr. Evseroff, despite the fact that his fee was paid in cash which had originally been delivered to Mr. Evseroff. Mr. Evseroff controlled neither the selection of attorneys nor the allocation of fees. There was no fee splitting, and Mr. Evseroff did not withhold any forewarding fee or kickback for himself before delivering Mr. Taub's fee as defendants have alleged. Cash turned over to Mr. Evseroff for distribution to the other attorneys was turned over in exactly the form and amount decided upon by the clients. Mr. Evseroff's fee was $75,000, of which he received $50,000, an appropriate amount in light of the complexity and length of the trial. Other attorneys received somewhat lesser fees commensurate with their experience.

Undoubtedly Mr. Evseroff and Mr. Taub conferred during the course of the representation regarding defense strategy and fees. Such communication among co-counsel is normal and to be expected in a complex, multi-defendant case such as this one. The fee arrangement, although somewhat unconventional, is understandable in view of the fact that most of the defendants were related. The rules of legal ethics and representation should not be interpreted so as to divorce them from the practical needs and desires of the clients they are designed to protect.

Mr. Taub was operating independently of Mr. Evseroff. Thus, any failure on the part of Mr. Taub to employ available defenses could not have resulted from Mr. Evseroff's alleged conflict of interest.

B. Failure of Mr. Bartolotta and Other Potential Witnesses to Testify

All defendants and all counsel were informed and aware of the fact that Mr. Evseroff had represented Mr. Bartolotta in related state court proceedings and of the resulting potential conflict that might inhibit their defense. All defendants, particularly Mr. Evseroff's own client, insisted emphatically that he continue to represent them despite any such conflict.

Mr. Bartolotta's failure to testify was not attributable to a conflict of interest on the part of counsel. Petitioners' argument on this issue is supported only by the bald assertion of Mr. Bartolotta that he would have testified if he were called—without any indication of what he would have said—coupled with the retrospective assertions of the petitioners and their co-defendants that they wanted him to take the stand. Such paltry evidence is inadequate to demonstrate that calling Mr. Bartolotta would have been a plausible defense tactic—is the first prong of a showing of actual conflict of interest. Petitioners' similar assertions regarding counsel's failure to call Ms. Volpe or Mr. Salemi, and the accusation that their cross-examination and summation on matters involving Mr. Ragusa and Mr. Bartolotta was intentionally weak, are supported by even less evidence.

All of the evidence taken together indicates that the decision to keep Mr. Bartolotta off the stand was the result of plausible tactical considerations in which both Mr. Scaduto and Mr. Aiello concurred. Messrs. Evseroff, Taub, Rabin, and Sussman each stated emphatically that Mr. Bartolotta had no credibility as a witness following the disclosure at trial that he had conducted a major heroin deal in his car while in the company of his two children. There is every indication that all the defendants concurred in the decision not to call him. Mr. Evseroff states in his deposition that Mr. Scaduto was "dead set against it." The testimony and other depositions support this conclusion.

C. Other Inadequacies in Representation Alleged by Petitioners

There is no reason to rule on whether the alleged failure of defense counsel to pursue various other potential arguments and motions resulted in a denial of petitioners' rights, because we find that no such omission could logically have been related to a conflict of interest. Mr. Evseroff's decisions not to move to suppress an incriminating videotape, "allow" the defendants to testify on their own behalf, introduce his own translations of tape transcripts, or make a speedy trial motion could not conceivably have innured to the benefit of any of his other clients. We note nevertheless that petitioners' counsel appear to have met minimum standards of competency. The case was a difficult one, and nothing they did or failed to do would have had any appreciable effect on the verdict. The evidence against their clients was quite strong. The tactical decisions in context were sound. Making fruitless motions and arguments could have served no useful purpose.

D. Prior Investigations of Mr. Evseroff

With regard to the petitioners' claim that Mr. Evseroff's conduct in prior cases establishes a pattern of representation of conflicting interests, the court notes the disturbing nature of this alleged patern. Nevertheless, the overwhelming weight of evidence in the instant case indicating the lack of any actual conflict clearly outweighs the evidence suggesting that the alleged pattern of conflicts could have had any appreciable effect on the petitioners' trial.

There is not the slightest evidence that Mr. Evseroff pulled punches in defense of his client to curry favor of the prosecutor in order to avoid prosecution for his own delicts.

E. Summary of Answers to Questions Posed by the Court of Appeals

(1) Who paid trial counsel? The defendants paid counsel, and Mr. Evseroff served only as a conduit for the distribution of their fees.

(2) How much did counsel receive? Mr. Evseroff received $50,000. Other counsel received fees commensurate with their level of experience.

(3) Were fees withheld or kicked back to Mr. Evseroff? No fees were withheld, kicked back, or split.

(4) Were fees divided as a form of referral fee? Fees were not divided, and no referral fees were paid.

(5) Did the petitioners want Mr. Bartolotta to testify? After discussing the issue extensively with their counsel,

petitioners decided that they did not want Mr. Bartolotta to testify.

(6) Did defense counsel want Mr. Bartolotta to testify? If not, why not? Defense counsel did not want Mr. Bartolotta to testify, because they believed that given the evidence which could have been introduced to impeach him, his testifying would have prejudiced their clients more than it would have helped them.

F. Evidence Considered by the Court

In reaching these findings, this court has considered extensive testimony presented over a period of three day, as well as briefs submitted by the petitioners and the government, affidavits of the petitioners' attorneys, depositions of the defendants' attorneys, and portions of the record in the case at bar and in the prosecution of Mr. Bartolotta in state court. We find that the affidavits, depositions, and testimony of Mr. Evseroff and other defense counsel are credible and consistent with the trial record, and that the affidavits of the petitioners are not.

V. Suggestions for the Future

Although the petitioners have failed to meet their burden of demonstrating an actual conflict of interest which adversely affected counsel's performance in accordance the *Cuyler* standard, counsel's conduct and methods of operation cannot be approved. Much of it resulted in an appearance of impropriety and should be avoided in the future. Faith of defendants and the public in the legal system would be enhanced, an unnecessary litigation avoided, were counsel to adhere to the following guidelines:

1. Payment of fees to independent counsel should be made directly and not by lump-sum payment to be distributed by one attorney to co-counsel. Fee-splitting and use of referral fees without the explicit consent of the client is always improper. Where an attorney is paid by the court for representing an indigent client, the court's permission must be obtained for any diversion of the fee.

2. An attorney who works in another attorney's office, whether as partner, associate, or co-tenant should be treated as a partner for the purpose of evaluating a possible conflict.

3. Representation of another party in any arguably related case in the same or another court, whether state of federal, should be treated as if it were a representation of that party in all related cases for purposes of determining whether there exists a conflict of interest.

4. Counsel should make known to the client all possible conflicts that might arise. Counsel should make known to the court on the record in the presence of the client all possible conflicts, real or apparent, that might arise. The court will then inquire on the record to ensure that the clients' sixth amendment rights are protected, and a hearing will be held if necessary. Defendant should be present at all relevant proceedings to ensure that she or he understands the nature of the possible conflict and its consequences.

5. Counsel are reminded that the practice of receiving large payments in cash may present civil and criminal issues that are beyond the scope of the questions posed by the court of appeals in this case. The court makes no findings with respect to the implication that delivery of the fees to Mr. Evseroff in the form of bags of cash constituted a method of money

laundering. This is, however, an issue the bar may wish to address along with other issues raised in this memorandum in order to avoid future problems.

Conclusion

The petition to set aside the judgements of conviction is denied. 28 U.S.C. § 2255. A certificate of probable cause is granted.

So ordered.

Dated: Brooklyn, New York
February 29, 1988

Chief Judge, U.S.D.C.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	CR 83 429
—against—	United States Courthouse Brooklyn, New York
LORENZO SCADUTO and ANDRE AIELLO,	
Defendant.	February 8, 1988 3:00 o'clock p.m.

TRANSCRIPT OF MOTION
BEFORE THE HONORABLE JACK B. WEINSTEIN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: ANDREW J. MALONEY
United States Attorney
BY: GREGORY O'CONNELL, ESQ.
Assistant United States Attorney
225 Cadman Plaza East
Brooklyn, New York

For the Defendant: MICHAEL VINCENT RICCI, ESQ.
For Scaduto

WILLIAM E. LORE, ESQ.,
For Aiello

Court Reporter: Henry R. Shapiro
225 Cadman Plaza East
Brooklyn, New York
718-330-7687

Proceedings recorded by mechanical stenography, transcript produced by computer.

HENRY R. SHAPIRO
OFFICIAL COURT REPORTER

THE COURT: We've been waiting for the defendants and they haven't been brought over. We can argue it without them since it's a argument on the law or we can put it off until tomorrow.

MR. RICCI: Michael Ricci.

MR. LORE: William Lore.

MR. O'CONNELL: Gregory O'Connell.

MR. LORE: I have no objection to proceeding without my client. Before we get into that if I may, Mr. O'Connell has provided me with some more materials that were in the nature of Court Exhibit One, additional statements, including a letter from Mr. Evseroff's secretary. I have no objection to amend this. Mr. Ricci has a translation of the Italian—

THE COURT: I haven't seen it.

MR. RICCI: I would move that into evidence. It has a seal on it. We gave you the original.

THE COURT: Do I have all of these materials?

MR. RICCI: I don't know about the Italian document. I could go look for it now.

THE COURT: You say these are supplements to one.

MR. RICCI: Yes.

THE COURT: Mark them as One A. What is the number of the document which is now translated.

MR. RICCI: I don't have the number, your Honor. Sorry.

THE COURT: Mark it as Defendant's Exhibit A. I think all the others are court exhibits.

THE COURT: Do we have all the copies.

THE CLERK: We have the original right now.

THE COURT: Hold them.

THE COURT: Does anybody want to submit any other exhibits.

MR. O'CONNELL: Just to put a couple of things on the record. Included on the record is the criminal history of Paul Labriola, one of the affiants.

THE COURT: Was that marked?

MR. O'CONNELL: It was marked. We want to bring to your attention there were two federal convictions that were not on the printout. One was in 1974 for forgery of U.S. savings bonds.

The second was in 1981 again charges concerning stolen U.S. savings bonds and forgery.

There is a Second Circuit order if your Honor wants to look at it which refers to some of the substance of it which I can offer.

THE COURT: Mark that as Government Exhibit 1.

MR. O'CONNELL: The charges included 38 counts of forgery.

THE COURT: Anything further.

MR. O'CONNELL: I don't know if Mr. Ricci addressed the question whether he wants to proceed without Mr. Scaduto being present.

MR. RICCI: I would join with co-counsel in terms of it being argument.

THE COURT: I have now a brief of the government and a joint brief from the defendants; is that right.

MR. RICCI: Yes.

MR. LORE: Yes.

THE COURT: Whatever happened to Francesca Bartolotta.

MR. O'CONNELL: She withdrew her application.

THE COURT: What was she sentenced to.

MR. O'CONNELL: Her original sentence I think was five years. She's in a half way house now.

MR. RICCI: She's here. Five years.

THE COURT: But she's not incarcerated.

MR. RICCI: She made halfway house December something.

MR. O'CONNELL: I recall seeing a letter from her counsel—

THE COURT: I understand. That is why these two are pressing. Do you want to add anything.

MR. LORE: I wish to get into the argument if the court pleases. I had intended to summarize the major points from the prospective briefs.

Our basic point, mine and my client's, he was denied the effective assistance of counsel. From the start the initial affidavit from the client he did not want Arnold Taube as his attorney and this attorney was thrust on him.

My point has been that Mr. Taube was subject to Mr. Evseroff's control. In the deposition I believe we showed various means of the control. However wittingly or unwitting.

Number one, Mr. Evseroff and his employee, I think it was well established that Mr. Rabin was his employee. He received something like thirty-four thousand dollars a year in benefits by being his associate, or Mr. Evseroff used the word employee in his office. In percs and in weekly payments not tied to any specific case.

THE COURT: What does that have to do with Taube? Your client was represented by Taube.

MR. LORE: Yes, your Honor.

THE COURT: Taube was an independent attorney, wasn't he.

MR. LORE: He was independent in the sense he was not a member of Mr. Evseroff's office. Mr. Evseroff did testify that Mr. Aiello had an attorney up in Buffalo and that he had believed that Mr. Rabin was sent up to Buffalo or was requested to be sent up to Buffalo. We did not get into evidence. He did actually go to Buffalo, in order to, inform the attorney up there that he was no longer on the case, that Mr. Taube had been hired.

As a matter of fact, according to the testimony of the witnesses themselves, Mr. Taube was hired and paid two or three times before he ever met Mr. Aiello. His conversation were with Mr. Evseroff, and two people from the Ragusa family.

THE COURT: That is not uncommon that somebody in effect pays for a lawyer while they are being brought here.

MR. LORE: That may not be uncommon. There was no indication—Mr. Taube had no indication that the client knew about it. There was some reference that the people who hired him said, we talked with Mrs. Aiello Aiello, and she says okay.

Mr. Taube never testified that he called the other attorney, made any contact.

THE COURT: I don't find that at all convincing. They sat next to each for months and your client never objected to Taube. When he got here he never objected. Taube so far as I can tell was an a very fine lawyer. At least he on paper had very fine experience.

MR. LORE: I'm not sure about his experience. He testified that he went into private practice in February of '83.

THE COURT: What did he do before he was in private practice.

MR. LORE: I understand he was in the prosecutor's office.

THE COURT: That is main training ground for defense in this city.

MR. LORE: Your Honor, I think—

THE COURT: Nothing that he did, you have shown that was at all adverse to the client. I really don't find any domination of him by Evseroff.

MR. LORE: Perhaps you don't see it. I would like to focus on one exhibit which Mr. Taube says was devastating to the client, that is the video tape of Mr. Aiello's warehouse in Buffalo. W A B C made a motion to release the tape. It was played twice during the government's summation. The jury requested to see it. All the attorneys have said it was devastating. No motion was made that the prejudicial effect outweighed the probative value.

THE COURT: What was Aiello's standing.

MR. LORE: It was his warehouse.

THE COURT: I don't find there was much of a basis for suppression there anyway.

MR. LORE: The Court of Appeals seemed to have believed it was in violation of Title Three. It was a potential violation.

THE COURT: Potentially, yes.

MR. LORE: That was never gone into. The reason why, Jeff Rabin was doing all the motions. He never got to this one. He said he never saw the orders. Taube said he doesn't think there was an order.

THE COURT: Is that a constitutional violation.

MR. O'CONNELL: It's a matter of record there was a court order for the video.

THE COURT: That is a different matter than Evseroff seeking to dominate, because everybody would have gained by an suppression. It's an entirely different issue. It's not an issue on remand. The issue on remand is not an issue whether your client was well represented. Certainly under constitutional theory as laid down by the Supreme Court, representation wasn't so poor we can say his constitutional rights were violated.

MR. LORE: I would submit it was that poor.

THE COURT: Was that raised on the appeal.

MR. LORE: On the direct appeal.

THE COURT: Yes.

MR. LORE: Or our appeal.

THE COURT: Anyone.

MR. LORE: I don't recall it being a point. The video tape was an issue.

THE COURT: No, was there an issue raised with respect to his right to effective counsel?

MR. LORE: The whole issue of conflicts that stems—

THE COURT: Conflict is different. You are now saying that he didn't do a good job because he didn't make these points.

MR. LORE: I mean that as a result—your Honor asked me the question did that—was there anything—I didn't see anything shoddy about the performance.

THE COURT: I must say I don't see any conflict here. I simply don't credit your client, and Taube and Evseroff are admitted members of the bar. I read their materials and they seem fully consistent with what all the other attorneys said. We have a family situation here. It's not uncommon for families to pay this way. The evidence was overwhelming that they were all involved in an illegal enterprise and the ring leaders, either hung separately or stayed together. That is what they did.

MR. LORE: Perhaps if we look at it this way. We're talking about the question of effective assistance of counsel—

THE COURT: We're talking about conflict. As far as effective assistance I find that given all of these circumstances there was not such in effective assistance as to constitute a

violation of constitutional rights.

We're down to the issues before me as remanded by the Second Circuit. I don't find any conflict. Evseroff did not dominate Taube.

MR. LORE: We're focusing on the Sixth Amendment and the right to counsel. Imagine if you will, Mr. Aiello, has an attorney in Buffalo. Mr. Aiello's we have a better attorney. The families are going to bank role the whole thing, Mr. Ragusa, I don't know where he is, his daughters are here. This laywer will not make any motions. He'll let my employee Jeff Rabin, we are not going to look at the orders, all we're going to do is object to its prejudicial value. Aiello is not going to say, yes.

THE COURT: At the time he agreed to accept the attorney. He did it without anybody breaking his arm. He did it openly and freely. Taube was a decent attorney as far as I can tell. You might have tried it differently. You might have been more successful. Given the evidence as it developed I don't think you would have. I don't credit his testimony that he didn't want Taube.

MR. LORE: Several of the other—not to be argumentative. Several of the other attorneys who have nothing to lose in this sense—of course Mr. Taube is going to say that Mr. Aiello's wanted him.

THE COURT: I credit what he says.

MR. LORE: We have other attorneys Mr. Aiello complained to me. Rabin bin said it. Sussman said it or he's complaining to everyone else but not to his own lawyer. It

evidences his own satisfaction. We're looking at a denial of the right to counsel.

THE COURT: That is not enough. Every defendant I see practically when he loses after trial is dissatisfied with his counsel. If his counsel gets an acquittal he's the greatest person in the world. You have tried enough cases to know that. After the event everybody can second guess.

MR. LORE: Your Honor, the fact is even being on a misdemeanor panel, on 18 B in Queens, I know that you don't divy up clients with people in your office. You just don't do that.

THE COURT: I don't believe that as to Taube there was any divying up. There may be argument as to somebody else. Taube was not directly connected with Evseroff at all. There is nothing to be gained by Evseroff appointing Taube. Taube was quiet independent. He's from the Bronx.

MR. LORE: He was chosen according to Evseroff's testimony. Evseroff was the man who was giving effect to the desires of the family—

THE COURT: Of course that is true.

MR. LORE: He was reappraised because they thought Aiello would turn informant. Those were Mr. Evseroff's own words. Obviously the corollary of that or the assumption, Mr. Taube is going to go along with the program, not the attorney.

THE COURT: I don't credit that. I can't believe that Taube sold his client out. There is no evidence of that.

MR. LORE: That's my client's position. It appears to be an interpretation of the—

THE COURT: I will look at the records again and reread what I think is necessary. I simply find it difficult to credit your client as against all of these attorneys.

MR. LORE: Half of the attorneys said Mr. Aiello didn't want Taube.

MR. LORE: We had the motion for contempt that your Honor ruled on. I was dismayed not having been in your Honor's court before, but prior to being in your Honor's court on this matter, I was a little bit aghast in what I saw to be a bunker mentality on the part of the government and the defense witnesses. People you talked to on the phone don't have the guts to put something in writing. You have to subpoena everyone into the courtroom—

THE COURT: Who did you want to get that didn't come in?

MR. LORE: Your Honor we did get them in under the egis of the Court. That is the only way we dragged these people in.

THE COURT: For whatever reason they were here. I think we have had a full elucidation of the issues. What conclusion should be drawn is arguable. I don't believe you have been denied any evidence that was available.

MR. LORE: The only thing that we haven't gotten the letters rogatory.

THE COURT: Where are those materials? Do you have anything?

MR. O'CONNELL: No, your Honor. I gave all the information that I have been able to come up with. All I have gotten is a report from the Office of International Affairs—

THE COURT: Did you give it in writing.

MR. O'CONNELL: The only writings that were read to me over the telephone were letters—letters transmitted in '84—

THE COURT: Where are those documents?

MR. O'CONNELL: In Washington.

THE COURT: Get copies. You have communication, instantaneous communication with Washington. I want copies of those documents in the file turned over to defendant. I want your letter of transmittal saying in the letter, if this is the case, that these are all the documents that could be obtained and you have nothing else.

MR. O'CONNELL: The only way to get additional information would be by contacting a magistrate in Italy—

THE COURT: Did you hear what I just told you?

MR. O'CONNELL: Yes.

THE COURT: Then do it. I haven't asked you to go to Italy. The defendants can go to Italy if they want to.

MR. LORE: If I may on that point. Mr. Summers, who

was then assistant United States attorney recalled clearly that a decision was made to postpone that matter until after the trial and did we did present some documents. I find it hard to believe that the United States attorney attorneys has no documents, that they are only in Washington, D.C.

THE COURT: That is what they tell me and I'll accept that.

Next.

MR. RICCI: I would like to join—

THE COURT: I can't decide the case until that information is supplied, is that clear?

MR. O'CONNELL: Yes, your Honor.

MR. LORE: I join in counsels arguments and rely on the brief that we've submitted in terms of laying out all of the facts in this case. I would simply like to read something quickly and this is from U.S. against Cataldo which is—I will get the cite 625, F. Supp, 1255 Southern District 1985. There is a part here where the judge is quoting from Judge Bryant who had previously asked a series of questions to the particular defendant. I think it's phrased very well and I don't think I can improve.

"Are you aware of the possibility that Mr. Corio or any attorney so situated may be unable to give you impartial advise because he has another ongoing matter with the government at the same time and there is a possible incentive or risk that anybody so situated might be motavated to act in some fashion which would improve his relationship with the government prosecutors in his own case and possibly to your

detriment? Do you understand that risk may exist.

The defendant replied, "Yes I understand.

The judge, "Do you understand further that Mr. Corio or any attorney so situated might be unwilling or unable to advise you impartially as to whether or not you should effect a disposition of this case or how this case should be handled because of the fact that he might fear that any discussion you had with the government might adversely effect his own relationship in connection with this possible difficulties in the Eastern District or elsewhere. Do you understand that?

The defendant responded, "I do.

Judge Bryant further asks whether the defendant understood that Mr. Corio might be required to focus attention on his defense to the detriment of the defendant.

Might be called to trial at any time leaving the defendant to obtain a new attorney at the last minute.

To each of these questions the defendant responded affirmatively.

Judge Bryant then asked the defendant, "Now do you understand—Now do you understand that you have a right to make a change in counsel at any time providing that change does not delay the trial and it is your obligation to yourself to consider whether these matter impair your constitutional right to have the effective independent representation of counsel in connection with this case due to the fact that your attorney is under indictment in Federal court in a different district, do you understand that?

The defendant, "Yes I do."

The case turned on other points, I believe, but at least the jist of the argument, Mr. Evseroff's version—

THE COURT: Who represented your client?

MR. RICCI: Mr. Evseroff.

THE COURT: He himself.

MR. RICCI: He himself.

THE COURT: His domination of others is not an issue in your case. If he dominated others, presumably it was in favor of your client.

MR. RICCI: Yes, he never told my client and even admits that on the deposition, that he never told him about the investigation which was prior to this January 13.

THE COURT: What investigation.

MR. RICCI: Like I say I join in everything said—

THE COURT: What investigation.

MR. RICCI: The investigation by the United States Attorney's Office.

THE COURT: Of who.

MR. RICCI: Of Mr. Evseroff.

THE COURT: I don't understand what that has to do with your client. He wasn't being investigated in connection with these events.

MR. RICCI: No, but he was under investigation. The analogy with the Cataldo case we had a situation where Judge Bryant—

THE COURT: Corio was indicted.

MR. RICCI: Correct. What Judge Bryant is saying to Mr. Cataldo applies equally if Mr. Scaduto had known that Mr. Evseroff was under investigation.

THE COURT: I don't—

MR. RICCI: —and he was never told about that.

THE COURT: I don't believe that the United States Attorney can in effect put a lawyer out of business by investigating him.

MR. RICCI: I'm not saying that at all. Not at all. I'm not saying that he's automatically disqualified.

THE COURT: Did Evseroff know he was being investigated by the grand jury.

MR. RICCI: If you read the papers on the—that we submitted under the Torterelli case there is the Brian Mass affidavit indicating that Mr. Evseroff was told prior—the Court of Appeals decision—we have a date January 13. There is then a letter by Mr. Evseroff, in the Torterelli case, referring to the—Mr. Mass affidavit saying I didn't know until then.

Then there is Judge Mishler who makes the finding that he knew and wasn't told until that date. As of the January 13 date we have—

THE COURT: It's remote. Are you saying that he laid down on Scaduto in order to gain favor with the United States Attorney? He wouldn't be prosecuted in his own case?

MR. RICCI: What I'm trying to say he's not automatically disqualified. What he should have done or the United States Attorney should have done, is say Mr. Scaduto, Mr. Evseroff is under investigation, then we could have had a Judge Bryant situation saying—

THE COURT: I have given the same warnings to defendants as Judge Bryant did when Corio was representing somebody.

MR. RICCI: At least Cataldo knew.

THE COURT: And the evidence is clear here that Scaduto did not know.

MR. RICCI: Absolutely he says it and Mr. Evseroff I asked that question.

THE COURT: Then you have the other point.

MR. RICCI: The other point.

THE COURT: Bartolotta was being represented.

MR. RICCI: And all at the same time.

THE COURT: It the others—Bartolotta was represented in the state proceeding.

MR. RICCI: And Solemi was seen by Mr. Rabin during that proceeding too.

I would just like to end it with another short quote. I'm quoting from page 192 of the Gambino transcript which we put before the court. I like the phrasing of this. Mr. Carnesse is on the stand and the prosecutor is asking him a series of questions and it gets to the point with this conflict and the prosecutor says.

QUESTION: As an officer of the court—he's talking to Mr.—questioning Mr. Carnesse—as an officer of the court, you certainly didn't go to Judge Lacy and say, "Judge I think Mr. Evseroff has a conflict of interest here, did you?

ANSWER: No, sir I did not.

THE COURT: I might add that no one from the government went to him either, did they?

THE WITNESS: I'm glad you said that before I did, Judge.

MR. ROTH: There is a difference. The government didn't know that Jacob Evseroff represented—the government in this district MarryAnn Murphy and Ed Balinkus, who handled the case, did not know that Mr. Evseroff represented Giatano Mosara in the Southern District of New York or we would have.

I think that is the idea—

THE COURT: I understand. It's not a easy case. What does the government have to say.

MR. O'CONNELL: Your Honor, we have laid out our arguments in the brief. I would like to respond to a couple of things.

One, Mr. Lore has made a very lose reference to the record concerning other defense attorney's comments about Aiello's complaints, about his representation, by Taube. I think all that the record will show is that a couple of the defense attorneys during the deposition mentioned that they thought they recalled Aiello complaining that he did not see Taube enough. Which is a common complaint. I don't think there was substance to the complaints at all.

In so far as this Concilla argument is concerned, I think your Honor rightly points out that the facts in Concilla are entirely distinguishable from this case. There is absolutely no relationship between the subject matter of the Ragusa case and the investigation of Evseroff which our office had under way in 1983.

THE COURT: What is the answer that you give that there should have been a motion to suppress the TV tape in Aiello in the warehouse in Buffalo.

MR. O'CONNELL: Your Honor, I think that would come under ineffective assistance on the merits. As your Honor pointed out and the standard for assessing the attorney's performance is one which is very foregiving, and in any event, I'm not certain, and I've been unable to find in the record whether an objection to the admission of that tape had been filed or not. I think there was an objection. Counsel had testified that

they did object to the admission of the tape.

THE COURT: Counsel for the defendant—

MR. LORE: Page 2278.

THE COURT: You'd better go through the record and see what there is on that. If the objection was under Rule 403 grounds that is entirely different from a motion to suppress.

MR. RICCI: The two objections were won Mr. Taube objected on the basis that the prejudice far outweighed—

THE COURT: That is Rule 403—

MR. RICCI: And Mr. Evseroff objected on no proper foundation.

THE COURT: It's a common motion. Every defense lawyer would normally make such a motion.

MR. O'CONNELL: There was a federal court order in place which permitted the video to be installed.

THE COURT: They always go behind the court order to see whether there is a basis.

MR. O'CONNELL: I don't see any connection between the failure—

THE COURT: Do we have in the record all the supporting data for that court order in Buffalo?

MR. O'CONNELL: I'm sure it's in the record. It's a matter

of retrieving it.

THE COURT: Retrieve it and submit it.

MR. O'CONNELL: What I fail to see is any connection between a conflict claim raised by the petitioners and the suppression issue, if any, regarding that video tape in the Buffalo warehouse.

THE COURT: I suppose arguably if Evseroff were using Taube as a stooge, he might have thought if Aiello didn't suppress, may be Scaduto would have gotten off. I don't know how it would be argued.

MR. O'CONNELL: The tape certainly was helpful to the government's case. It showed Aiello and Scaduto within the warehouse dismantling the pallets which contained the heroin or formerly contained the heroin. I can't imagine how it would be viewed as helpful to either Scaduto or Aiello's case. Scaduto's case in the conflict scenario to include that tape in the government's case and not to object to it. It's just a ludicrous suggestion that it's connected to a conflict issue. It doesn't make any sense.

I responded already—

THE COURT: That is the difficulty I have with it. It may show incompetence, but it doesn't show that incompetence was due to conflict.

MR. O'CONNELL: I don't think any neglect or lack of care by the defense attorneys rises to the level of irresponsibility which would effectively deny the constitutionally entitled right to counsel of these defendants at trial.

THE COURT: You will submit all that documentation. I will take a look at it and see if there was any real basis for a motion. If there was no substantial basis may be that is why they didn't make it.

MR. O'CONNELL: There was a lack of standing on the part of Scaduto.

THE COURT: Yes, Scaduto doesn't have standing.

MR. O'CONNELL: It was a matter of Aiello's assessment—

THE COURT: They would have had to sever.

MR. LORE: That is the point.

THE COURT: I understand the point. They would have had to sever the case.

MR. LORE: It was Taube's doing.

MR. O'CONNELL: I think your Honor has noted there has been an insufficient showing, if any, that Evseroff controlled the tactical strategy decisions of the other defense attorneys involved in the trial. There were several critical decisions made by defense attorneys that we have attorney testimony about that were completely at odds with the suggested view of Evseroff. That included the decision—

THE COURT: He didn't dominate the trial. That is fairly clear to me.

MR. O'CONNELL: I think that would go hand in hand

with a rejection of the argument that the failure to—of Taube to file a pretrial motion to suppress the video tape was connected to his domination and thus his conflict. I don't see it. I don't think that they have established it. The other issue raised and specified for further inquiry by the Second Circuit concerned the failure to call Salvatore Bartolotta as a witness.

Each of the defense attorneys was questioned on this subject. We have laid out their responses in our statement of facts and memorandum, your Honor. There is a consistency to the view of each of these defense attorneys as to what their tactical reasons were for not calling him as a witness. Primarily it was the lack of appeal that that witness would have—

THE COURT: Was there ever a motion to sever the various defendant's cases.

MR. O'CONNELL: I'm not certain of that.

THE COURT: Would you look into that too and give me that in a letter. That is a very strange circumstances.

MR. RICCI: The docket sheet doesn't indicate any at all.

THE COURT: Then at least some of these people would have wanted to call Bartolotta.

MR. LORE: There were oral motion mades during the trial, but none that I recall to paper.

THE COURT: Better check the record and let me know what was in the way of motions to sever.

MR. RICCI: With reference to that court order—

THE COURT: One at a time.

MR. O'CONNELL: One thing that is glaring in the record that has been finalized and before the court. It's something that is glaringly absent. There is no indication from Salvatore Bartolotta what exculpatory testimony he would provide.

THE COURT: Where is he now?

MR. O'CONNELL: He must be incarcerated in the state system.

THE COURT: Do you want a proffer as to what he would say?

MR. O'CONNELL: They haven't come forward.

THE COURT: Do you want to make a proffer.

MR. LORE: The shortest answer, no, your Honor.

THE COURT: That is enough. That's enough you don't want to make a proffer.

MR. O'CONNELL: In response to that we do have the testimony of Mr. Evseroff on the subject that he was aware of no exculpatory testimony that could have been provided by Bartolotta.

THE COURT: I suppose the answer to that is accurate.

MR. O'CONNELL: We have the—as I said, your Honor,

we have the testimony of Mr. Taube, that Aiello never requested that Bartolotta testify. We have the testimony of Mr. Evseroff and Mr. Rabin that Mr. Scaduto rather than wanting to call him to testify held Mr. Bartolatta in very low steam and had no interest in calling him as a witness.

Everything points to the conclusion I would suggest that there was never any serious contemplation by the defense for calling Bartolotta as a witness.

THE COURT: I think that is probably so.

THE COURT: I'm going to have to decide what the Court of Appeals remanded as issues.

I can tell you, if this was my trial, and I don't say this critically of anybody, that I would have granted a new trial. Had this situation ones before with a very eminent defense counsel who when I told him somebody else had to represent the co-defendant, arranged for somebody in his office to represent the co-defendant, without informing me that they were related in the same office. I wasn't aware of it, and after the conviction, even though the conviction was a very strong one, I insisted on a new trial on the theory that should have been brought to my attention so that I could inquire of the defendants.

The practice here was very sloppy at best. I did not try the case. I just got very narrow questions posed by the Court of Appeals.

MR. LORE: If I may be heard?

THE COURT: If you want to amend your 2255 application

in other respects you can do so while I'm waiting for these matters to be tied up by the Government.

As it now stands I believe I'm restricted to what the Court of Appeals remanded for.

MR. RICCI: If I may—

THE COURT: If you want to have a broader 2255 you will have to move in the Court of Appeals for a general remand as I understand it. It has been remanded only for the issues that they pose, isn't that so.

MR. O'CONNELL: That is the way I view the decision.

MR. RICCI: I direct your attention to the very first paragraph of the Court of Appeals decision and the remand. It's talking Sixth Amendment. Whether it's a Sixth Amendment violation—

THE COURT: I'm just a trial judge and I do what the Court of Appeals tells me to do. Let me see the opinion.

MR. O'CONNELL: Your Honor, if there is—

THE COURT: May I see the opinion?

MR. RICCI: I have it someplace, yes.

MR. O'CONNELL: I have a copy.

MR. RICCI: It starts out quote—

THE COURT: Excuse me.

Remanded for further proceeding under conflict of interest claims.

MR. RICCI: I think what we can put in there the example you brought out to a person that works in his office, that was never before the court and that is clearly conflict.

THE COURT: I'm not going to do anything that wasn't before the court. If you want me to go any further than the narrow issues I believe the Court of Appeals has remanded to this court, you are going to have to move to amend your 2255 application.

MR. RICCI: Before this Court.

THE COURT: Before this Court and then I'm—Aiello deem that denied. You will have to go to the Court of Appeals and ask for a broader remand to consider the broader issues under Rule 2255 including any Sixth Amendment, adequacy of counsel rights, and so on. Otherwise I don't believe I have the power.

MR. RICCI: It was always my understanding on reading the case law under that 44 C with reference to association, et cetera, that is clearly under the egis of the Sixth Amendment, conflicts of issues.

THE COURT: I don't believe it is.

You are raising a new issue with respect to adequacy of representation. Rather than spend a lot of time unnecessarily, if you want to expand the 2255 application and raise all of these other issues and have a complete decision on the 2255 you had better move for an amendment of the order of

remand.

MR. RICCI: Your Honor, if I may can I direct your attention to footnote one of page 1899. That is going under. You notice they didn't go with the requirement of 44 C because the judge had no evidence of the association—

THE COURT: That doesn't necessarily decide the issue of whether that shouldn't have been made known. The judge can make inquiry. Particularly in view of footnote one if I were in your position I would move in the Court of Appeals for remand on all issues and then seek to broaden the 2255.

MR. O'CONNELL: Is your Honor alluding to the relationship, or whatever it might have been, between Rabin and Evseroff that troubles you?

My view it would be to the detriment of—

THE COURT: My position as a trial judge is, I want to know everything about representation. If there is any association between the lawyers, if one lawyer is controlling the other lawyer, possibly. If one lawyer is paying the other lawyer. If they have joint clients, I want to know so I can raise it in advance and not waste my time with a trial. I take a very firm view of that matter. But whether my general views in a case that I would try should applied in this case retroactively I don't know.

I can tell you any lawyer who didn't tell me would be excoriated in my court and I told the lawyers previously involved before me if they ever did that again they were going to go to the disciplinary committee. I considered it an attempt to mislead the court.

This is not my trial. Its been remanded for a narrow issue. Judge Costantino recused myself. If you want me to do everything in the case get a broader remand. I don't know whether I'll decide for the defendants. I'm not sure. I don't credit their testimony. I think they lied throughout. I believe generally the attorneys told the truth, but whether that is dispositive I'm not sure.

MR. O'CONNELL: I would like to note for the record the relationship that existed between Rabin and Evseroff in that office is one which was fully explored by counsel throughout this proceeding, throughout these depositions.

THE COURT: It was not explored by the trial judge. It was not told to the trial judge at the beginning of the case and the trial judge did not ask the defendants about it. That's what disturbing.

MR. O'CONNELL: I understand.

THE COURT: Get what I told you to get. Defendants will decide what they want to do in the Court of Appeals.

MR. RICCI: Could we make that motion—

THE COURT: I'm denying it.

MR. LORE: Could we make it—

THE COURT: I have limited power. If you want to expand the 2255 you will have to go to the Court of Appeals.

MR. LORE: Would your Honor take it in the context of a motion to review based upon newly discovered evidence.

THE COURT: No.

I'm not going to expand the 2255. That is the one before the Court of Appeals and the one they remanded. I'm not going to waste my time doing something the Court of Appeals has not authorized me to do.

Order a copy of the record and discuss what you want to do.

Submit a copy.

MR. LORE: Can we have a control date on the information from Washington, D.C.

THE COURT: Could you get it in two weeks.

MR. O'CONNELL: I don't want to mislead anyone into thinking that we'll have a final answer from these records that the office—

THE COURT: I don't want any final answer. I just want the records.

MR. O'CONNELL: Whatever records are available.

THE COURT: That is what I want.

MR. O'CONNELL: I'll try to hve them available in a couple of weeks.

THE COURT: You have three weeks. If you don't hear from the defendants with respect to a motion to amend the order on remand, it's going to be decided solely on the 2255

that went up to the Court of Appeals and that they decided the case on and it will be decided on the issues remanded by the Court of Appeals.

MR. RICCI: Can I ask your Honor, when you say haven't heard from the defendants, are you saying you want a copy of the motion made.

THE COURT: I would like to know what you are doing. I would like to close this out. It's about time.

Thank you very much.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 525—August Term, 1986

(Argued: December 11, 1986 Decided: March 18, 1987)

Docket No. 86-2236

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

— v. —

ANDREA AIELLO a/k/a ANTONIO AIELLO, FRANCESCA BARTOLOTTA and LORENZO SCADUTO,
Defendants-Appellants.

Before:

OAKES, CARDAMONE and DAVIS*
Circuit Judges.

*Honorable Oscar H. Davis, U.S. Circuit Judge for the Federal Circuit, Washington, D.C., sitting by designation.

Andrea Aiello, Francesca Bartolotta and Lorenzo Scaduto appeal from an order entered June 6, 1986 in the United States District Court for the Eastern District of New York (Costantino, J.) that treated their Fed. R. Crim. P. 33 motion for a new trial as an application for a writ of habeas corpus and denied the application. Appellant Scaduto separately appeals from an order of February 13, 1986 that denied his Fed. R. Crim. P. 35(a) motion to correct his sentence. Insofar as the order denied habeas relief, it is reversed and remanded for further proceedings. Insofar as it denied appellant Scaduto's motion for resentencing, it is affirmed.

Reversed in part and remanded.

Affirmed in part.

WILLIAM E. LORE, Forest Hills, New York, *for Defendant-Appellant Andrea Aiello.*

MARTIN OZER, New York, New York, *for Defendant-Appellant Francesca Bartolotta.*

MICHAEL RICCI, Whitestone, New York, *for Defendant-Appellant Lorenzo Scaduto.*

JULIE COPELAND, Assistant United States Attorney, Eastern District of New York (Andrew J. Maloney, United States Attorney, Eastern District of New York, David V. Kirby, Emily Berger, Assistant United States Attorneys, Eastern District of New York, of counsel), *for Plaintiff-Appellee United States of America.*

CARDAMONE, *Circuit Judge*:

Loyalty of a lawyer to his client's cause is the *sine qua non* of the Sixth Amendment's guarantee that an accused is entitled to effective assistance of counsel. Because defense counsel are best positioned to know when a conflict exists or will likely develop during the course of trial, the initial responsibility for preventing the erosion of a client's rights rests on the lawyer's shoulders. This appeal raises questions concerning whether in this case that duty was adequately discharged.

I. BACKGROUND

Andrea Aiello, Francesca Bartolotta and Lorenzo Scaduto appeal from the disposition of their Fed. R. Crim. P. 33 motion for a new trial, which the district court treated as an application for a writ of habeas corpus, 28 U.S.C. § 2255, and denied. Appellants' claims arising from their convictions on heroin importation and distribution charges have been previously considered and affirmed on direct appeal in *United States v. Aiello*, 771 F.2d 621 (2d Cir. 1985). On the present appeal appellants assert that their trial attorneys had conflicts of interest that deprived them of effective assistance of counsel in derogation of their Sixth Amendment rights. Although the district court reviewed all the affidavits submitted on this issue, it denied the application without a hearing. Because we think that appellants are entitled to a fuller inquiry into their claim, the order denying the writ is reversed and the matter is remanded to the district court for further proceedings. Appellant Scaduto also appeals the denial of his Fed. R. Crim. P. 35(a) motion to correct his sentence. Finding no merit to his claim, we affirm.

A. *Facts*

A brief summary of background facts is necessary. Federal and state agents arrested Lorenzo Scaduto, Andrea

Aiello, Salvatore Bartolotta, and Filippo Ragusa in September 1983. Ragusa is the father of appellant Francesca Bartolotta, wife of Salvatore Bartolotta, and Maria Scaduto, wife of appellant Lorenzo Scaduto. Francesca Bartolotta was arrested and indicted several months later. Shortly after the initial arrests, the two sisters—Francesca and Maria—asked Mr. Evseroff to represent all of those arrested on drug charges. He agreed to represent Francesca's husband Salvatore and recommended a number of lawyers to represent the other defendants. Among these were Mr. Jeffrey A. Rabin, who later became Francesca Bartolotta's trial counsel and Mr. Arnold Taub, who represented appellant Andrea Aiello at trial. Attorney Evseroff, in an affidavit, states that shortly after Salvatore Bartolotta's arrest and indictment by a New York State Grand Jury he was asked to represent Bartolotta in the state proceeding. Once Bartolotta was severed from the original federal charge, Mrs. Scaduto and Mrs. Bartolotta then asked Evseroff to represent Lorenzo Scaduto on the federal charge. Attorney Evseroff further states that attorney Rabin was retained to assist him in representing Scaduto on the federal charges. Neither attorney indicates in their affidavits *who* retained attorney Rabin. In addition to appearing for Scaduto, Mr. Rabin states that he made appearances for Salvatore Bartolotta in the state proceeding. Thus, at the end of 1983, Mr. Rabin was assisting Mr. Evseroff in his representation of Salvatore Bartolotta and Lorenzo Scaduto.

When appellants' trial began in March 1984 Evseroff continued to represent Salvatore Bartolotta and Scaduto, Mr. Rabin represented Mrs. Bartolotta, and Mr. Taub defended Aiello. Evseroff's affidavit merely states that "it was decided that Mr. Rabin ... would represent Francesca Bartolotta." Mr. Rabin's affidavit does not indicate

whether he was still consulting with her husband when he undertook Mrs. Bartolotta's defense. No dates are provided.

B. *Alleged Areas of Conflict of Interest*

There are two areas of disagreement between the affidavits submitted by appellants and the attorneys' affidavits furnished by the government—each area raises the possibility of a conflict of interest. The first area of an alleged conflict of interest is the failure to call Salvatore Bartolotta to testify. This conflict of interest contention centers on attorney Jacob Evseroff who served as Scaduto's trial counsel. Mr. Evseroff also represented Francesca Bartolotta's husband, Salvatore, who was an unindicted coconspirator in his wife's federal trial and a defendant in state court for his part in the heroin scheme. Appellants assert that Evseroff failed to call his client Salvatore Bartolotta to testify in appellants' federal trial because he put Bartolotta's interests above their interests. Trial counsel representing the other appellants also failed to call Bartolotta as a witness because these lawyers were controlled, appellants allege, by attorney Evseroff.

Appellants insist that they wanted Salvatore Bartolotta to testify. Scaduto and Aiello state that they asked their attorneys to call him, and Francesca Bartolotta indicates that she discussed this possibility with Mr. Rabin. In their affidavits attorneys Evseroff, Taub, and Rabin aver that their respective clients did not wish them to call Bartolotta as a witness.

The affidavits submitted in support of the appellants' applications suggest a reason for the failure to call Salvatore Bartolotta. Scaduto, Aiello, Maria Scaduto, and Rosa Ragusa—another daughter of Filippo Ragusa and sister of

Maria Scaduto and Francesca Bartolotta—all claim that Mr. Evseroff stated that he would not call Bartolotta because he would get "50 years to life" for the charges he was facing in state court if he testified in the federal case. Francesca Bartolotta attributes that same statement to attorney Rabin. Mr. Evseroff responds to that claim by stating that he discussed the possibility of Bartolotta testifying with Scaduto and Francesca Bartolotta and that they vociferously opposed it. Mr. Taub states that he never heard Mr. Evseroff state that Salvatore Bartolotta would get more time if he testified. Attorney Rabin admits discussing with Francesca Bartolotta the possible consequences of her husband's testifying, but denies stating that Salvatore Bartolotta would receive "50 years" if he did in fact testify. Moreover, attorneys Taub and Rabin cite tactical considerations for not having Bartolotta testify. Finally, Salvatore Bartolotta himself states in his affidavit that he was willing to testify, if called, but does not indicate what his testimony would have been.

The affidavits differ most sharply in the second area where there is a claimed conflict of interest. That alleged conflict concerns counsel fees. While Maria Scaduto and attorneys Taub and Evseroff agree that Maria Scaduto was the ultimate source of the money paid to the trial attorneys, they disagree as to the amount of fees paid and how the fees were paid. Maria Scaduto claims that she gave Mr. Evseroff $500,000 to pay for Evseroff's representation of both Lorenzo Scaduto and Salvatore Bartolotta, and for the services of the other attorneys. She further claims that Mr. Evseroff told her that the money would be distributed among the other attorneys, and informed her of what attorneys Rabin's and Taub's fees would be as part of that distribution. Her affidavit is silent as to who would make the distribution.

Mr. Evseroff denies that the aggregate fee for all the lawyers amounted to "anything approximating" $500,000. He does acknowledge that Maria Scaduto brought cash to his office for distribution and that the money was distributed according to each lawyer's fee arrangement. But he does not indicate who effected the distribution. Nor does Mr. Evseroff explain how he knew that the money was distributed according to each lawyer's fee arrangement, when he was ignorant of what those arrangements were. Contradicting Maria Scaduto, Mr. Taub claims that she paid him directly on several occasions.

The final point of disagreement involves the alleged withholding by attorney Evseroff of legal fees for Mr. Rabin, Mr. Taub, and other defense counsel. Maria Scaduto and Francesca Bartolotta both state that they had a September 1984 conversation with Mr. Rabin in which he is supposed to have said that Mr. Evseroff had withheld some of the money provided by Maria Scaduto. In response, the government produced a letter from attorney Rabin to an Assistant United States Attorney in which he denied making those statements. Because both Mr. Taub's and Mr. Evseroff's affidavits preceded the particular affidavits in which Scaduto and Bartolotta make this particular assertion, the attorneys' affidavits do not directly address it. Nonetheless, Mr. Taub's and Mr. Evseroff's various statements concerning the payment of fees are implicit denials of Scaduto's and Bartolotta's statements.

Faced with these conflicting sworn statements, the district court denied appellants' application without a hearing. The trial court held that the appellants had either failed to allege or establish an actual conflict of interest sufficient to qualify as an actual conflict of interest

whether the appellants wanted Salvatore Bartolotta to testify, whether the defense counsel did or did not want him and, if not, why not.

Two other factors persuade us that summary disposition of appellants' application was inappropriate. Appellants have not previously had an evidentiary hearing on this claim, *see Dalli,* 491 F.2d at 761, and the circumstances providing the factual basis for appellants' application occurred outside of the courtroom. Thus, the files and records of the case would be of little or no aid to the trial court in passing on it. *See Machibroda,* 368 U.S. at 494-95.

For these reasons, we reverse the district court's order that denied their application for a writ and remand the case for further inquiry into appellants' claims. Of course, such inquiry may take the form of an evidentiary hearing, or the district court, in its discretion, may utilize any of the habeas rules designed to supplement the record without the necessity of conducting a full-blown evidentiary hearing. *See* Rules Governing Habeas Corpus Cases, 28 U.S.C. app. fol. § 2255 (1982). *See also Blackledge,* 431 U.S. at 81-82 (discussing the advantages of Rules 6 and 7 of the Rules Governing Habeas Corpus for supplementing the record while avoiding the necessity of a hearing).

III. SCADUTO'S RESENTENCING

Scaduto appeals from his resentence by the district court following the disposition of the direct appeal. Scaduto was convicted at trial of conspiracy to import heroin (21 U.S.C. §§ 952, 960, 963), conspiracy to distribute heroin (§§ 841, 846), the substantive crimes of possession of heroin with intent to distribute (§ 841) and importation of heroin (§§ 952, 960), and, managing a con-

tinuing criminal enterprise (§ 848). He was sentenced to a 35 year term with a $100,000 fine for the § 848 conviction, a 14 year term and a $25,000 fine for each of the two conspiracy convictions—these terms to run concurrently with each other and consecutively to the § 848 sentence—and a 15 year term and $25,000 fine for each of the two convictions for the substantive crimes, these terms to run concurrently to each other, but consecutively to those on the other counts. *See Aiello,* 771 F.2d at 626-27.

On Scaduto's direct appeal we followed the procedure outlined in *United States v. Osorio Estrada,* 751 F.2d 128 (2d Cir. 1984), *modified on reh'g on other grounds,* 757 F.2d 27 (2d Cir.), *cert. denied,* 106 S. Ct. 97 (1985), for handling convictions for lesser and greater offenses. Thus, we vacated Scaduto's sentences for the conspiracy convictions and remanded the case to the district court for it to combine those convictions with the continuing criminal enterprise conviction, as well as for resentencing on the latter conviction. *See Aiello,* 771 F.2d at 634. Upon remand, the district court ultimately vacated the conspiracy convictions, thereby effectively combining them with the § 848 conviction, and increased the sentence for the § 848 conviction from 35 to 45 years. The § 848 sentence was concurrent with the sentences for the two substantive counts. As a result of the district court's resentencing, the total sentence imposed on Scaduto was reduced.

The exact ground of Scaduto's challenge to the district court's action is unclear. Presumably appellant objects to the increase in the sentence on the § 848 conviction following the combination of it with the conspiracy convictions. If this is the objection, it is groundless. We have previously approved an increase of a § 848 sentence after a conspiracy conviction has been combined with it. *See*

adversely affecting counsel's performance. From this disposition an appeal was taken.

II. ALLEGED CONFLICT OF INTEREST CLAIMS

A. *Standards For Assessing*

The standard for assessing whether an attorney's conflict of interest renders his assistance ineffective is set forth in *Cuyler v. Sullivan,* 446 U.S. 335 (1980). "In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 350. In examining this question, we consider first whether the district court had a duty under either Fed. R. Crim. P. 44(c) or the Constitution to inquire at the time of trial into Mr. Evseroff's representation of Scaduto and Salvatore Bartolotta.

Appellants' argument that the trial court erred in failing to conduct a hearing into Mr. Evseroff's dual representation as required by Rule 44(c) is misplaced. The language of Rule 44(c) itself indicates that a hearing is required only in cases where defendants have been "jointly charged" or "joined for trial." The Advisory Committee Note accompanying the Rule confirms this: "Rule 44(c) establishes a procedure for avoiding the occurrence of events which might otherwise give rise to a plausible post-conviction claim that because of joint representation the defendants in a criminal case were deprived of their Sixth Amendment right to the effective assistance of counsel." Fed. R. Crim. P. 44(c) Advisory Committee Note. Moreover, appellants do not point to—nor has research uncovered—any case where a court has applied Rule 44(c) when one attorney represents two defendants—one of whom is a potential witness in the trial of the other—

B. *Dismissal Without A Hearing*

Even without an affirmative duty to inquire at trial, the relevant question on this appeal becomes: Should the district court have denied the appellants' post-trial application without further inquiry? While it would go too far to say that it was error for the district court to have failed to conduct a full evidentiary hearing; nevertheless, it was not an appropriate case for summary dismissal of the petition. The language of § 2255 states that "[u]nless the motion and the files and records conclusively show that the prisoner is entitled to no relief, the court shall ... grant a prompt hearing." 28 U.S.C. § 2255 (1982). As a result, we look with disfavor on summary rejection of a habeas petition when it is supported by a "*sufficient* affidavit." *Dalli v. United States,* 491 F.2d 758, 760 (2d Cir. 1974) (emphasis in original).

When considering a § 2255 habeas application the supporting affidavits must be examined first. Opposing affidavits should also be considered in order to test the sufficiency of the petitioner's allegations, but not for finding them false. *See, e.g., Machibroda v. United States,* 368 U.S. 487, 495 (1962); *United States v. Franzese,* 525 F.2d 27, 30-31 (2d Cir. 1975), *cert. denied,* 424 U.S. 921 (1976). Not every application that is supported by a set of facially meritorious allegations will survive a motion to deny the writ. To warrant plenary presentation of evidence, the application must contain assertions of fact that a petitioner is in a position to establish by competent evidence. *See Machibroda,* 368 U.S. at 495-96; *Dalli,* 491 F.2d at 761. Whether there is a genuine issue of material fact depends upon the sufficiency of those factual allegations. Airy generalities, conclusory assertions and hearsay statements will not suffice because none of these would be

in two different forums.[1] Thus, we conclude that in this instance the trial court had no duty under Rule 44(c) to conduct an inquiry.

The Sixth Amendment also imposes a duty upon a trial court to inquire when it "knows or reasonably should know that a particular conflict exists." *Cuyler,* 446 U.S. at 347. Appellants argue that there were three separate occasions when Mr. Evseroff indicated that he was representing both Bartolotta and Scaduto. Yet, taken together these instances were insufficient to alert the trial court to a possible conflict of interest. First, attorney Evseroff's remarks made it clear that Bartolotta and Scaduto were facing *separate* proceedings. *See Cuyler,* 446 U.S. at 347 ("The provision of separate trials for [the petitioner] and his codefendants significantly reduced the potential for a divergence in their interests."); *Mosier v. Murphy,* 790 F.2d 62, 65 (10th Cir. 1986) (following *Cuyler*). Second, the attorney's comments indicated that Bartolotta's and Scaduto's interests converged, rather than diverged, on the particular issue that Evseroff was raising before the court. *Cuyler* instructs that the consistency or compatibility of co-defendants' defenses is a factor to be considered in determining whether the trial court had notice of a potential conflict. *See Cuyler* at 347. Finally, appellants did not object at trial to the dual representation. *See id.* at 347. Thus, we conclude that the district court was not obliged by *Cuyler* to conduct an inquiry at the trial.

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[1]Appellants also argue that attorneys Rabin and Evseroff were "associated in the practice of law" within the meaning of Rule 44(c). Such a relationship also triggers the requirement for an inquiry. This claim is meritless. There is no evidence suggesting that the trial court should have been aware of this "association" if, in fact, it existed.

admissible evidence at a hearing. *See Franzese,* 525 F.2d at 31. Hence, like a motion for summary judgment in civil cases, both the petitioner's and government's affidavits—taken together—are used to determine the existence of genuine issues of material fact. *See Blackledge v. Allison,* 431 U.S. 63, 80-81 (1977); 3 C. Wright, *Federal Practice & Procedure,* § 599 at 499 (2d ed. 1982). If the affidavits disclose such material issues, then the application will survive a motion to dismiss and a contrary ruling that summarily disposes of the petition is error. *See Allison,* 431 U.S. at 82-83.

The affidavits submitted here disclosed genuine issues of material fact that should have been explored further. As noted, they reveal sharp disputes concerning who paid trial counsel, how much such counsel received, whether fees were withheld, and whether the fees were divided as a form of a referral fee. If these questions were resolved in appellants' favor,[2] it would then appear that attorney Evseroff was in a position to control other defense counsel. If that in fact was what occurred, it would be tantamount to his representing all the appellants and constitute, therefore, an impermissible conflict. The other dispute concerns whether Mr. Evseroff had an actual conflict of interest in representing both Scaduto and Salvatore Bartolotta. Again, the affidavits sharply disagree on

[2]The affidavits submitted, including those submitted by counsel, if true, raise disquieting questions about trial counsels' sensitivity to issues of professional responsibility. In addition to the alleged basic conflict of interest, there are questions involving referral fees and fee splitting and withholding. Appellants also cite other unrelated conflicts of interest, such as neglecting to discuss potential conflicts of interest with clients, contacting a defendant without the knowledge or approval of that individual's attorney, and failing to preserve the confidences of a client. The record before us is far too incomplete to reach any conclusions on these allegations, but we note them because they are troublesome ones that may not properly be ignored.

United States v. Mourad, 729 F.2d 195, 203-04 (2d Cir.), *cert. denied*, 469 U.S. 855 (1984). *See also United States v. Grayson*, 795 F.2d 278, 287 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 927 (1987) (district court may increase sentence for § 848 conviction following vacation of conspiracy conviction).

CONCLUSION

Accordingly, the judgment denying appellants' relief under 28 U.S.C. § 2255 is reversed and remanded for further proceedings on the conflict of interest claims. The order denying Scaduto's motion to be resentenced is affirmed.

Reversed and remanded in part.

Affirmed in part.

APPENDIX F

FILED
in Clerk's Office
U.S. District Court, — N.Y.
June 5, 1986

MEMORANDUM OF DECISION AND ORDER
83 CR 429

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

—against—

ANDREA AIELLO, a/k/a "ANTONIO AIELLO," FRANCESCA BARTOLOTTA, and LORENZO SCADUTO,

Defendants.

Defendants move this court pursuant to F.R. Crim. P. 33 for a new trial upon the ground that newly discovered evidence requires a new trial in the interest of justice.

This court, after having reviewed the submissions of defendants' concluded that the alleged conflict of interest in violation of defendants' Sixth Amendment rights was not newly discovered evidence at all, but rather an application for a writ of Habeas Corpus pursuant to 28 U.S.C. 2255.

exculpatory. The opposition also highlights the fact that defendants were aware that Evseroff represented both Scaduto and Salvatore Bartolotta.

There is neither a claim nor an intimation that THIS COURT was aware of Evseroff's multiple representation.

The government also submitted the affidavits of defendants' former counsel. These affidavits state in relevant part:

Jacob Evseroff details the circumstances surrounding his retainer by Francesca Bartolotta and Maria Scaduto. Evseroff claims that he had numerous conferences with Scaduto and Salvatore Bartolotta and that "it was made abundantly clear by Scaduto, and by Salvatore and Francesca Bartolotta, that none of them were desirous of Salvatore Bartolotta testifying as a witness in [this] trial, although I suggested this to each of them as a viable possibility, though I did not recommend it and all of them unanimously and vociferously opted against his testimony."

Evseroff further states that Salvatore Bartolotta "never entertained the prospect" of entering a negotiated plea to his pending state indictment, "and that he had planned to put the State to its proof."

Additionally, Evseroff contends that it was his advice that Mrs. Bartolotta and Aiello each testify on their own behalf but that this advice was ignored. Evseroff denies withholding fees due to the other attorneys in the case and claims that the fees were distributed in accordance with the agreement between the parties.

Jeffrey Rabin, in his affidavit, denies Mrs. Bartolotta's

contention that his legal advice to her was based upon a desire to protect her husband. Rabin concedes a prior appearance on behalf of Scaduto but notes that it was prior to Mrs. Bartolotta's being indicted. With respect to the contention that Mr. Bartolotta should have been called as a witness on his wife's behalf, Rabin contends tht she was advised that it would have been to her "detriment to have her husband called to the stand because of the wealth of material that the prosecution had to cross-examine him on and attack his credibility with. Mrs. Bartolotta concurred in this decision never wanting her husband to learn all the facts of her case or hear the conversations she had with a Francesca Affatigato, the individual that she had an ongoing relationship with during that time."

Rabin also contends that the decision not to call Mrs. Bartolotta "as a witness was done for her benefit and her benefit alone without any concern for the plight of her husband."

Rabin's affidavit discusses Mrs. Bartolotta's adamant refusal to ever testify at her trial.

Rabin's affidavit also discusses Scaduto's great dislike for Mr. Bartolotta. "It was always Mr. Scaduto's belief that Mr. Bartolotta was a liability and that the danger in calling him as a witness far outweighed the benefit that there would have been in using him."

Arnold Taub's affirmation avers that it was his impression that Aiello was satisfied with his representation in that Aiello was acquitted of an § 848 count. Taub denies ever hearing anyone tell Aiello that there was no case against him especially after "having seen the videotape of Aiello removing

I. THE MOTION

The alleged "newly discovered evidence" is defendant's conclusion that since the attorney for defendant Lorenzo Scaduto ("Scaduto"), Jacob Evseroff, ("Evseroff") also represented Salvatore Bartolotta, the Sixth Amendment rights of the above-named defendants were violated.

Salvatore Bartolotta is the husband of defendant Francesca Bartolotta. Salvatore Bartolotta was not a defendant in the instant case. He was, however, prosecuted for substantially the same offenses in a New York State court proceeding and was an unindicted co-conspirator in this case. Salvatore Bartolotta was convicted upon a plea of guilty to the State court charges pursuant to a plea-bargain agreement.

Francesca Bartolotta also contends that because her attorney, Jeffrey Rabin, ("Rabin") appeared at a pre-trial conference on behalf of Salvatore Bartolotta, her Sixth Amendment rights were compromised.

Andrea Aiello, ("Aiello") contends that since Scaduto and Francesca Bartolotta's Sixth Amendment rights were violated, he too, must have been a victim of the alleged conflict of interest.

This court directed the parties to submit briefs on the Sixth Amendment issues. Neither the government's nor the defendants' briefs cite the proper authority for the propositions espoused. The defendants, however, citing *United States v. Cancilla,* 725 F.2d 867 (2d Cir. 1984) have alleged the following:

1. That Mr. Evseroff admittedly represented not

only Mr. Scaduto but also Salvatore Bartolotta and Filippo Ragussa;

2. That Mr. Rabin admittedly represented not only Mrs. Bartolotta but also Charlie Salemi for a time and Sal Bartolotta on a hearing;

3. That Mr. Evseroff not only handpicked defense counsel but also may have arranged for their payment at his offices;

4. That Mr. Evseroff may have either misappropriated funds by taking illegal and unethical referral fees from other defense attorneys (including Mr. Rabin and Mr. Taub) and/or held back a portion of their legal fees to extort their cooperation, however tacitly; and

5. That Mr. Evseroff, whether acting out of loyalty to his clients, self-interest, or admiration for Mr. Taub, may have, knowingly or not, forced Mr. Aiello to accept Mr. Taub as his attorney.

6. The fact that Mr. Evseroff appears to have been involved in both *Cancilla* and our case may be more than a happy coincidence and should alert the Court to ponder his predisposition and credibility on conflict-of-interest questions. In *Cancilla* as well, he failed to perceive or admit to any conflict.

Moreover, the defendants have submitted affidavits as follows:

Lorenzo Scaduto contends that he insisted that Evseroff call Salvatore Bartolotta as a witness on his behalf and that

Evseroff refused. Scaduto claims that Salvatore Bartolotta would have convinced the jury that the name "Lorenzo" referred to in a "notebook" found in Bartolotta's house was not him.

Maria Scaduto contends that Salvatore Bartolotta would have exonerated her husband. Mrs. Scaduto also contends that Evseroff told her that he "controlled" the other attorneys on the case.

Andrea Aiello contends that he was not given any choice in the selection of counsel, but rather that Evseroff told him that Arnold Taub ("Taub") would be his attorney. Aiello claims that his trial was a "mockery" and his lawyer was Evseroff's "puppet." Aiello additionally claims that he was willing to testify on his own behalf, but was not permitted to do so. Aiello also contends that Salvatore Bartolotta's testimony would have exonerated him.

Rosa Ragusa contends that Salvatore Bartolotta expressed his willingness to testify at the trial. She also claims to have asked Evseroff if he was going to call Salvatore Bartolotta at the trial and that Evseroff said that if Bartolotta testified he "will get fifty years to life."

Francesca Bartolotta contends that she was advised not to call her husband as a witness because he would get "fifty years." Mrs. Bartolotta was also dissuaded from testifying on her own behalf "because I would have had to implicate my husband."

Salvatore Bartolotta's affidavit states that he was informed of his status as an unindicted co-conspirator in this case and that evidence involving him was admitted at the trial. He is

also aware that a notebook "allegedly taken from my house was introduced into evidence" at the trial. He also states that Rabin has, in the past, appeared on his behalf. Finally Bartolotta avers:

> That I was not requested, subpoenaed or asked by Jacob Evseroff nor by any attorney to appear in this Court and testify on behalf of Francesca Bartolotta, Lorenzo Scaduto and Andrea Aiello. That had I been asked by attorney to testify I would have voluntarily testified and I was available to do so.

Maria Scaduto and Francesca Bartolotta submitted supplemental affidavits wherein they relate a conversation they had with Rabin at which time Rabin advised them that Evseroff "had not paid the other defense lawyers the money that had been left with him for their legal fees."

The government, in opposition, distinguishes *Cancilla* from the instant case but does not cite the relevant authority to be applied.

The government, however, pursuant to *United States v. Franzese*, 525 F.2d 27, 30 (2d Cir. 1975), *cert. denied sub nom Potere v. United States*, 424 U.S. 921 (1976), submitted affidavits of defendants' former counsel so as to enable this court to assess the sufficiency of the defendants' supporting affidavits and to establish that their factual allegations should not be deemed admitted in deciding whether a hearing should be held.

The government's opposition highlights the fact that it is defendants' affidavits rather than Salvatore Bartolotta's affidavit which claim that Salvatore's testimony would have been

the centerboard of tile pallets inside of which the Government alleged the heroin was hidden."

Taub also recites his dissatisfaction with Evseroff in that Evseroff refused to meet with him to discuss strategy.

Moreover, Taub recalls a meeting at the Metropolitan Correctional Center when he met with Aiello, Scaduto, and Evseroff. "Evseroff wanted to have Sal Bartolotta testify and Scaduto refused. There was no discussion between Aiello and me about Sal Bartolotta's testimony would do his case serious harm. I have never heard Evseroff tell anyone that Bartolotta would get more prison time if he testified for any one of the defendants in this case."

Taub denies having been Evseroff's puppet and he also denies any knowledge of fee arrangements with respect to any attorneys other than himself. He does, however, "attest" that his discussions regarding the retainer were made with Maria Scaduto and Francesca Bartolotta.

Maria Scaduto submitted an affidavit wherein she claimed that Evseroff, in addition to the $500,000 in legal fees she paid to him, also received $63,000 (from an unnamed source) to represent Salvatore Bartolotta. She concluded, without stating a basis for her knowledge, that Evseroff received 1/3 referral fees from other attorneys on the case. Additionally, Mrs. Scaduto contended that Evseroff received money for the representation of Filipo Ragusa, who is Mrs. Bartolotta's fugitive father.

Maria Scaduto and Francesca Bartolotta each submitted affidavits whereby they contend:

> Rabin told us that Jacob Evseroff, Esq., had not paid the other defense lawyers the money that had been left with him for their legal fees.
>
> He told us that, of the $75,000 which had been turned over for Arnold Taub, Esq., Taub received only $25,000; likewise for Rabin, Raymond Sussman, Charles Carnese, Anthony Lombardino, was to get $62,500 but only got $25,000; Patrick Burke and Maria Candelaria also got less than the $25,000 they were supposed to get.

In response, the Assistant U.S. Attorney submitted a letter wherein he stated that Rabin told him that he (Rabin) did not make the statements attributed to him by Mrs. Scaduto and Mrs. Bartolotta.

II. THE TRIAL

A seven count superceding indictment filed on October 20, 1983, charged ten individuals with a variety of narcotics violations. Scaduto and Aiello were charged with conspiracy to import and distribute heroin, 21 U.S.C. §§ 846, 963, importing heroin, 21 U.S.C. §§ 952, 960, and managing a continuing criminal enterprise, 21 U.S.C. § 848. Scaduto was also charged with possession with intent to distribute heroin, 21 U.S.C. § 841. Francesca Bartolotta was charged with one count of conspiracy to possess heroin with intent to distribute, 21 U.S.C. § 846.

In October 1982, an undercover narcotics officer initiated a relationship with Charles Salemi ("Salemi"). Salemi was a supplier of heroin. Salemi introduced the officer to his supplier, Salvatore Bartolotta.

Thereafter, surveillance and telephone wiretaps of the Bartolotta residence were conducted pursuant to warrants issued by a Justice of the New York State Supreme Court.

The wiretaps and surveillances disclosed conversations between Salvatore Bartolotta, Filipo Ragusa, Salemi, Francesca Bartolotta as well as between Scaduto and Aiello.

In fact, the government's proof indicated, *inter alia,* that:

1. Francesca Bartolotta had two narcotics related conversations with Salemi.

2. Government agents intercepted a shipment of tile from Italy to Aiello which contained 18 kilograms of heroin.

3. The government agents replaced the heroin with harmless powder and the shipment was continued to Aiello's warehouse.

4. Scaduto thereupon went to Buffalo under an assumed name and was picked up at the airport by Aiello.

5. Aiello and Scaduto were recorded by videocamera examining the shipment.

6. Three days after the delivery of the tile shipment to Aiello, federal and state agents, with warrants, raided several locations and made a series of arrests and conducted searches. Scaduto, Aiello and Francesca Bartolotta were arrested during the roundup. A search of the Bartolotta residence turned up heroin, guns, and narcotics paraphernalia. Neither the harmless

white powder nor the tile shipment was located at either Aiello's home or warehouse.

7. Scaduto was convicted of conspiring to import heroin and to distribute it, of importing heroin, of possessing it with intent to distribute, and of managing a continuing criminal enterprise.

8. Aiello was convicted of conspiracy to import and to distribute heroin and of importing it, but he was acquitted of managing a continuing criminal enterprise.

9. Francesca Bartolotta was convicted of conspiring to possess heroin with intent to distribute.

During the course of the rather lengthy trial, this court had the opportunity to observe the demeanor and bearing of the moving defendants. To the extent that the defendants ask this court to consider Mr. Evseroff's complicity in the *Cancilla* matter when assessing his credibility, this court shall also assess the credibility of the moving defendants and their family members, who have submitted affidavits in support, in a similar vein.

In fact, Rosa Ragusa testified at the trial. Her testimony, which the jury chose not to believe, was to the effect that the blenders used in the preparation of heroin were actually used to make a breakfast drink.

The court also notes two outbursts in this courtroom by Rosa Ragusa in which Maria Scaduto was a participant. This court was particularly disturbed at the repeated expression of epithets of death ("You're gonna die!") delivered at the

Assistant U.S. Attorney and this court during the sentencing of Francesca Bartolotta.

Accordingly, this court shall consider whether defendants' Sixth Amendment rights have been violated solely on the basis of the moving papers, files, and record of the case. *See United States ex rel. Hussey v. LaVallee*, 428 F.2d 457, 458 (2d Cir. 1970).

III. DISCUSSION

1. Newly Discovered Evidence

On the papers before the court the motion is denominated as one for a new trial pursuant to F.R. Crim. P. 33. This court, having reviewed the papers, rejected the contention that the evidence set forth was "newly discovered."

In fact, the record is manifest that Scaduto and Salvatore Bartolotta were each distinctly aware that they were both being represented by Evseroff.

Moreover, it is equally apparent that this court was, at all times, wholly unaware of the multiple representation, and accordingly, was not in a position to ascertain whether Scaduto and Salavatore Bartolotta were aware of the potential conflict of interest that is currently asserted.

Nevertheless, the crux of the moving defendants' argument is that they were unconstitutionally denied the effective assistance of counsel. The contention, however, presents no Rule 33 questions whatsoever. Nevertheless, to the extent that defendants' allege a violation of their rights pursuant to the Sixth Amendment to the United States Constitution, the

motion is more properly treated by this court as an application for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2255.

2. **Right to Habeas Corpus Relief**

In seeking collaterally to attack their convictions under 28 U.S.C. § 2255, defendants bear the burden of establishing by competent evidence that they are entitled to a hearing. *Dalli v. United States*, 491 F.2d 758, 760 (2d Cir. 1974).

While genuine issues of material fact may not be resolved without a hearing, *see Blackledge v. Allison*, 431 U.S. 63, 80-81 (1977), a hearing is not necessary "when a § 2255 motion (1) is inadequate on its face, or (2) although facially adequate, is conclusively refuted as to the alleged facts by the files and records of the case." *Moran v. Hogan*, 494 F.2d 1220, 1222 (1st Cir. 1974).

Moreover, if the claim is based upon facts with which the trial court, through review of the record or observation at trial, is familiar, the court may make findings without an additional hearing. *Zovluck v. United States*, 448 F.2d 339 (2d Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972).

3. **Sixth Amendment Standard**

A. Generally

To prevail on this application defendants must each demonstrate that their attorneys were acting under an actual conflict of interest and there must be some specific instance of prejudice resulting from the multiple representation. *Holloway v. Arkansas*, 434 U.S. 475 (1978).

It is well settled that defendants must do more than merely allege that two or more defendants were represented by a single attorney. *United States v. Carrigan,* 543 F.2d 1053, 1055 (2d Cir. 1976); *Kaplan v. Bombard,* 573 F.2d 708, 712 (2d Cir. 1978); *Solomon v. LaVallee,* 575 F.2d 1051, 1054 (2d Cir. 1978).

In fact, in a case such as this, where Salvatore Bartolotta, the alleged beneficiary of the conflict, and the moving defendants, are prosecuted in different forums, the danger of conflicts is not so great. *Cuyler v. Sullivan,* 446 U.S. 335, 347 (1980). It is for this reason that an actual, not potential or speculative conflict, must be shown. *Cuyler v. Sullivan, supra. See also Holloway v. Arkansas, supra; Miller v. United States,* 564 F.2d 103, 106 (1st Cir. 1977), *cert. denied,* 435 U.S. 931 (1978) (distinguishes "dual" representation from "joint" representation).

It is for this reason, defendants reliance on *United States v. Cancilla, supra,* is entirely misplaced. It is apparent that defendants and their counsel are unaware that the *per se* rule set forth in *Solina v. United States,* 709 F.2d 160 (2d Cir. 1983) and addressed in *Cancilla* is applicable only in those instances where it can be assumed that the attorney for the defendant might have engaged in criminal activity related to the charge for which the defendant was convicted, or where the violation of defendant's rights is such that it may be said that he was not represented by counsel at all. *Lace v. United States,* 606 F. Supp. 50. (D.Vt. 1984), *aff'd,* 762 F.2d 990 (2d Cir. 1985).

Cuyler v. Sullivan, supra, cited in *Cancilla,* 725 F.2d at 869 unambiguously provides, that in a case such as this, "a defendant has the burden of showing an adverse effect on his

lawyer's performance when a conflict of interest surfaces for the first time after trial." *Id.*

The *Cuyler* court addressed the following two questions left unanswered by *Holloway:*

1. Whether a trial judge must inquire into the propriety of multiple representation even though party lodges an objection.

2. Whether the mere possibility of a conflict of interest warrants the conclusion that the defendant was deprived of his right to counsel.

In *Cuyler,* two attorneys represented the interests of three defendants. At no time did any of the defendants object to their representation. There were three trials. Sullivan was found guilty. Sullivan's co-defendants, Carchidi and DiPasquale, were acquitted.

Sullivan petitioned for collateral relief in State court. At a hearing thereon, Sullivan, Carchidi, the attorneys, and the trial judge testified.

> Sullivan testified that he had deferred to his lawyers' decision not to present evidence for the defense. But other testimony suggested that Sullivan preferred not to take the stand because cross-examination might have disclosed an extra-marital affair. Finally, Carchidi claimed he would have appeared at Sullivan's trial to rebut McGrath's testimony about Carchidi's statement at the time of the murders. *Cuyler* at 339.

The conviction was sustained throughout the state

appellate process. On an application for a federal Writ of Habeas Corpus, the District Court held there was no unconstitutional multiple representation. The Court of Appeals for the Third Circuit reversed. The U.S. Supreme Court vacated and remanded.

The Supreme Court answered the first question by holding:

> Absent special circumstances, therefore, trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist.

Cuyler at 347, citing with approval *United States v. Kidding,* 550 F.2d 1303, 1310 (7th Cir.), *cert. denied,* 434 U.S. 872 (1977); *United States v. Mandell,* 525 F.2d 671, 675-677 (7th Cir. 1975), *cert. denied,* 423 U.S. 1049 (1976);

The Court further held:

> Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry.

Cuyler at 347 (footnote omitted).

The second question was answered as follows:

> In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.

Cuyler at 348.

The footnote thereto reads:

> A substantial majority of the Courts of Appeals require defendants who contend that multiple representation violated their Sixth Amendment rights to identify an actual conflict of interest. See *United States v. Lovano*, 420 F.2d 769, 773 (CA2), cert. denied, 397 U.S. 1071 (1970); *United States v. Atkinson*, 565 F.2d 1283, 1284-1285 (CA4 1977), cert. denied, 436 U.S. 944 (1973); *Foxworth v. Wainwright, supra*, at 1077; *Thacher v. Bordenkirches*, 590 F.2d 640, 642 (CA5), cert. denied, 442 U.S. 912 (1979); *United States v. Mandell, supra.*, at 677-678; *United States v. Cox*, 580 F.2d, at 321-323; *United States v. Kutas*, 542 F.2d 527, 529 (CA8 1976); cert. denied, 429 U.S. 1073 (1977); cf. *United States v. Carrigan*, 543 F.2d 1053, 1056 (CA2 1975) (burden of proof shifts when trial court fails to inquire into possibility of conflict).

B. **Actual Conflict of Interest**

Generally, a defendant's claim that he was denied effective assistance of counsel will not be entertained simply because his trial resulted in a guilty verdict and he was represented by the same attorney which a co-defendant also retained. As the Second Circuit in *United States v. Wisniewski*, 478 F.2d 274 (2d Cir. 1973) noted:

> When a trial culminates in a verdict of guilty the temptation is great for defendant, armed with hindsight, to claim that his lawyer's strategy in not permitting him to run the cross-examination gauntlet was motivated by a conflict of interest....

> However, in the absence of objective evidence of corroboratory circumstances, such post-trial claims must be viewed with some suspicion.

Id. at 284.

Accordingly, a defendant's claim that his attorney acted under a conflict of interest must be shown with a reasonable degree of specificity, *United States v. Mandell,* 529 F.2d 671, 677 (7th Cir. 1975) (per curiam) *cert. denied,* 423 U.S. 1049 (1976), and must be based on the record and not on mere speculation. *United States v. Lovano,* 420 F.2d 769 (2d Cir. 1970), *cert. denied,* 397 U.S. 1071 (1970). *United States v. Mandell,* 525 F.2d 678, fn. 12.

> Although the Supreme Court has not defined what an 'actual conflict' entails, there are some indications given in the *Cuyler* opinion. First, the Court referred to the fact that a violation of Sixth Amendment rights occurs if 'counsel actively represented conflicting interests.' *Id.* at 350, 99 S. Ct. at 1719-20. Moreover, the Court elucidated the standard by comparing two of its earlier opinions. In *Glasser v. United States,* 315 U.S. 60, 62 S. Ct. 457, 86 L.Ed. 680 (1942), the Court held that multiple representation violated a defendant's constitutional rights when the record showed that defense counsel failed to cross-examine a prosecution witness whose testimony linked the defendant with the crime and failed to object to arguably inadmissible evidence. The Court in *Glasser* found that these omissions resulted from a desire to protect a co-defendant. On the other hand, in *Dukes v. Warden,* 406 U.S. 250, 92 S. Ct. 1551, 32 L.Ed. 2d 45 (1972), the Court found no constitutional violation where Dukes pleaded guilty on the

> advice of two lawyers and later discovered that one of them, representing Duke's co-defendants on an unrealted charge, sought leniency in sentencing by arguing that the co-defendant's cooperation with police led Dukes to plead guilty. As stated in *Cuyler*, the Court in *Dukes* failed to find anything in the record which indicated an 'actual lapse in representation.' 446 U.S. 349, 99 S. Ct. at 1719.

Therefore, in cases where a defendant alleges that a conflict was caused by the failure of his counsel to call a particular witness, or to explore a particular line of inquiry, the rule in this circuit is clear that "[t]o permit a *post hoc* judicial inquiry into earlier privileged attorney-client communications whenever a defendant seeks to set aside his conviction on grounds of conflict of interest ... would be virtually to outlaw joint representation since the temptation to attack his counsel's unsuccessful strategy would be too great for the disappointed client to resist . . . . Absent objective proof we cannot assume that a lawyer representing more than one client would act in violation of the Code of Professional Responsibility, much less ignore the opportunity to introduce proof which might acquit one defendant but not the other." *United States v. Wisniewski*, 478 F.2d at 285. *See also United States ex rel. Ross v. LaVallee*, 448 F.2d 552, 555 ("The existence of any conflict of interest because of the disparity in evidence is purely speculative."); *Smith v. Regan*, 583 F.2d 72, 77 (2d Cir. 1978) (no prejudice, where, overwhelming evidence and serious criminal record, militated against arguably exculpatory evidence being given credence); *Foxworth v. Wainwright*, 516 F.2d 1072, 1080 (5th Cir. 1975) ("An alleged conflict of interest that obstructs the use of a particular strategy or defense is not significant unless the defense is plausible").

Accordingly, as the Supreme Court stated in *United States v. Cronic*, —U.S.—, 104 S. Ct. 2039, 2045 (1984):

> The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors (footnote omitted.)—the kind of testing envisioned by the Six Amendment has occurred. (Of course, the Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no *bona fide* defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade. *See Nicholas v. Gagnon*, 454 U.S. 925, 92 S. Ct. 2504, 33 L.Ed. 2d 336 (1972) (remainder of footnote omitted)).

IV. DISCUSSION

1. Andrea Aiello

Aiello makes no effort whatsoever to allege that his attorney was acting under an actual conflict of interest. In fact, he merely alleges that he wanted a different attorney and that he argued with his attorney. Moreover, he "learned that Evseroff had a conflict of interest in representing Sal Bartolotta and defendant Scaduto at the same time."

This court fails to see how the alleged conflict impacted upon Aiello's constitutional rights.

Aiello was charged with, and acquitted of, a § 848 count. Obviously, he can point to no deficiencies in his representation in this regard.

Furthermore, of what value would Salvatore Bartolotta's testimony be to him? Salvatore Bartolotta was not present at the Aiello warehouse when the tile pallets were delivered. Salvatore Bartolotta was not privy to numerous drug-related conversations between Scaduto and Aiello.

This court will not counternance a "bandwagon" approach to constitutional rights. Furthermore, the defendants' argument fails because it does not distinguish between mere joint representation and an actual conflict of interest. Simply stated, the mere fact that Scaduto might have testified does not indicate an actual conflict. *United States v. Madina-Herrera,* 606 F.2d 770, 776 (7th Cir. 1979), *cert. denied,* 446 U.S. 964 (1980).

2. **Francesca Bartolotta**

Francesca Bartolotta also makes no effort to allege that her attorney was acting under an actual conflict of interest. Her and her attorney's unfamiliarity with *Cuyler v. Sullivan, supra,* and *United States v. Lovano, supra,* is manifest by her submission of a transcript where it is merely alleged that Rabin made an appearance on behalf of her husband.

Again, the testimony by Salvatore Bartolotta on behalf of his wife is, at best, speculative. First, Salvatore Bartolotta's affidavit makes no indication of what his testimony would be. Moreover, what knowledge would Salvatore Bartolotta have with respect to his wife's drug-related discussions over the telephone? Quite simply, he would have none. Furthermore,

Bartolotta would have had to have explained why he immediately tried to call his wife upon learning that federal agents were about to raid his house.

Unless Salvatore Bartolotta was going to ask the jury for mercy on behalf of his wife—not a legally cognizable basis for establishing a conflict—there is not much he could have done for her. *See, e.g., United States v. Mandell, supra,* 525 F.2d at 678.

The evidence simply does not support the allegation that Salvatore Bartolotta was not called to the stand because of an ethical conflict. Even if Salvatore Bartolotta had testified, his testimony could have been effectively impeached on the basis of his need to admit participation in the instant conspiracy as well as a lack of knowledge regarding specific overt acts committed by his wife. The proposition that Salvatore Bartolotta would have exculpated his wife is entirely speculative. *Haggard v. State of Alabama,* 550 F.2d 1019 (5th Cir. 1977), *cf., United States v. Lovano, supra,* 420 F.2d at 774 *with United States v. Pine,* 452 F.2d 507, 509 (5th Cir. 1971). In this context, the theoretical conflict did not render the attorney's assistance unconstitutionally ineffective. *United States v. Fannon,* 491 F.2d 129, 132 (5th Cir.), *cert. denied,* 419 U.S. 1012 (1974).

It is therefore clear to this court, that in view of the overwhelming evidence of guilt, Salvatore Bartolotta could offer no exculpatory testimony regarding his wife. *Compare, United States v. Alberti,* 470 F.2d 878 (2d Cir. 1972), *cert. denied,* 411 U.S. 919 (1973); *see also, Perez v. Harris,* 459 F. Supp. 1141 (S.D.N.Y. 1978).

3. **Lorenzo Scaduto**

Scaduto, too, makes no attempt, beyond mere conjecture, to establish an actual conflict.

First, Scaduto cannot really be serious when he claims that the name "Lorenzo" contained in a drug ledger found at the Bartolotta residence was not his name. Salvatore Bartolotta's affidavit is silent on this point. *See, United States v. Pinc,* 452 F.2d 507, 509 (5th Cir. 1971). Moreover, it is absurd to believe that, in view of the overwhelming evidence of guilt, that this isolated factor, may have led a jury to believe Scaduto was innocent.

Second, there is simply no genuine conflict between the defendants' version and Salvatore Bartolotta's version of the events. Scaduto merely alleges "innocence," Bartolotta merely expresses a willingness to testify.

> Since the bases of the convictions were separate telephone conversations, defense counsel argued on behalf of each defendant that the references to "shirts" and "pants" were innocent statements concerning wearing apparel. Counsel also questioned the accuracy of the agents' testimony in regard to the telephone calls. Other than the fact that each made separate calls to La Cosa, no evidence in this case related to petitioner Colangelo in any respect. Nor did the calls of one relate to any transaction that the other was negotiating with La Cosa; each transaction was separate and independent. A careful review of the massive record indicates no evidence that linked the two defendants in any way, save for the fact that each separately dealt with La Cosa by telephone (footnote omitted). There is not

> the slightest basis for petitioner's contention that the defense of one could have implicated the other. Indeed petitioner has not suggested any instance in which a potential conflict existed our could have arisen.

Yanni v. United States, 441 F. Supp. 1280, 1284 (S.D.N.Y. 1977), *aff'd*, 573 F.2d 1300, (2d Cir. 1978), *cert. denied*, 439 U.S. 840 (1978); *see also, United States v. Wisniewski, supra*, 478 F.2d at 285; *United States v. Atkinson*, 565 F.2d 1283, 1284 (4th Cir. 1977), *cert. denied*, 436 U.S. 944 (1978).

A review of *United States v. Mari*, 526 F.2d 117 (2d Cir. 1975), *cert. denied*, 429 U.S. 941 (1976), is appropriate. Two defendants, represented by the same counsel, each pled guilty to extortion. One defendant indicated that he would exculpate his co-defendant and take all the blame on himself. The Second Circuit concluded that the potential prejudice was in regard to that defendant who was willing to take the blame. *Id.* at 119. Accordingly, it is Salvatore Bartolotta, not Scaduto, who, under this reasoning, is entitled to claim prejudice. *See also, United States v. DeBerry*, 487 F.2d 448, 453 (2d Cir. 1973); *Kaplan v. Bombard*, 444 F. Supp. 233 (S.D.N.Y. 1977), *aff'd*, 573 F.2d 708 (2d Cir. 1977); *Smith v. Regan*, 583 F.2d 72 (2d Cir. 1978); *cf., United States v. Gaines*, 529 F.2d 1038, 1045 (7th Cir. 1976).

The gravamen of defendants' argument is that they were denied the right to compel Salvatore Bartolotta to incriminate himself and exculpate them. This court finds no authority for such a proposition. At the time this trial took place Salvatore Bartolotta was asserting his own right to go to trial on the charges against him. This court refuses to believe, under these circumstances, that Bartolotta's testimony would have been anything but the assertion of his Fifth Amendment privilege

against self-incrimination. Of course, Bartolotta's affidavit on this motion is silent in that respect.

The conclusion is inescapable that there was no real possibility that Salvatore Bartolotta would take the stand in this case. Moreover, had he testified, Salvatore Bartolotta, due to his lack of personal knowledge, would not be in a position to testify regarding numerous telephone conversations between the moving defendants as well as to the circumstances surrounding the meeting in Aiello's warehouse. *Compare, United Staets v. Mavrick*, 601 F.2d 921, 930 (7th Cir. 1979); *Willis v. United States*, 614 F.2d 1200, 1206 (9th cir. 1979). Accordingly, there is no merit to defendants' contention that Salvatore Bartolotta's testimony would lead to a not guilty verdict.

4. The Ethical Contentions

The allegations regarding possible unethical fee-splitting are based upon the weakest forms of conjecture and hearsay. This court neither credits the allegations nor believes them to be sufficient to state a constitutional violation. Rather, the allegations are best dealt with at the discretion of the appropriate ethics committees.

CONCLUSION

Defendants, who are clearly unaware of the applicable law, do no more than speculate that their constitutional right to the effective assistance of counsel has been violated. Defendants' allegation that Salvatore Bartolotta's testimony would exculpate them is belied by Bartolotta's own affidavit.

Acccordingly, since this court discerns no conflict of

interest or resultant prejudice to any of the moving defendants, this court does not accept their contention that they were denied the effective assistance of counsel.

The applications for a Writ of Habeas Corpus are denied.

SO ORDERED.

_____

U.S.D.J.

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 932, 909, 933 — August Term, 1984

(Argued: March 25, 1985 Decided: August 7, 1985)

Docket Nos. 84-1404, 84-1405, 84-1413

UNITED STATES OF AMERICA,

Appellee,

— against —

ANDREA AIELLO, a/k/a "ANTONIO AIELLO", FRANCESCA BARTOLOTTA, LORENZO SCADUTO,

Defendants-Appellants.

Before:

MANSFIELD, OAKES and WINTER, *Circuit Judges.*

Appeal from judgments of the Eastern District of New York, Mark A. Costantino, *Judge*, convicting appellants of various counts charging narcotics law violations. Appellants Scaduto and Aiello appeal convictions for conspiracy to import heroin and to distribute it, 21 U.S.C. §§ 846, 963, and for importing heroin, 21 U.S.C. §§ 952, 960. Appellant Scaduto also appeals convictions for possession with intent to distribute heroin, 21 U.S.C. § 841, and for managing a continuing criminal enterprise, 21 U.S.C. § 848. Appellant Bartolotta appeals a conviction for conspiracy to possess heroin with intent to distribute, 21 U.S.C. § 846.

Affirmed in part and remanded for resentencing in part.

GERARD E. LYNCH, Esq., New York, NY (Fischetti, Feigus & Pomerantz, New York, NY, of counsel), *for Appellant Aiello.*

JEFFREY A. RABIN, Esq., Brooklyn, NY, *for Appellant Bartolotta.*

ANNE C. FEIGUS, Esq., New York, NY (Ronald P. Fischetti, Esq., Mark F. Pomerantz, Esq., Warren L. Feldman, Fischetti, Feigus & Pomerantz, New York, NY, of counsel), *for Appellant Scaduto.*

WILLIAM J. CUNNINGHAM, III, Esq., Assistant U.S. Attorney, Brooklyn, NY (Raymond J. Dearie, U.S. Attorney for the Eastern District of New York, Mary McGowan Davis, Assistant U.S. Attorney, Brooklyn, NY, of counsel), *for Appellee.*

MANSFIELD, *Circuit Judge*:

Andrea Aiello, Lorenzo Scaduto, and Francesca Bartolotta appeal judgments of conviction of narcotics violations after a ten week jury trial in the Eastern District of New York before Mark A. Costantino, *Judge*. Appellants raise various issues, the most important of which are challenges to the district court's evidentiary and suppression rulings and to the ruling that a third-party's approach to one juror did not require the declaration of a mistrial. We affirm, except as to the disposition of Scaduto's convictions on two lesser-included offenses.

In October 1982 Daniel Costa, a New York City undercover officer, initiated a relationship with a heroin dealer named Charles Salemi. In the course of several heroin purchases from Salemi Costa became acquainted with Salemi's various customers and colleagues in the drug trade. Costa eventually purchased heroin directly from Salemi's source, Sal Bartolotta. Costa also encountered Fillipo Ragusa, whom Costa believed to be the ringleader of the heroin operation. Surveillance and telephone wiretaps of Bartolotta's phone were conducted by the Queens County District Attorney pursuant to eavesdropping warrants issued by a justice of the New York State Supreme Court on March 30, 1983, and on May 13, 1983. They disclosed communications between these individuals, appellant Scaduto and others and coded narcotics transactions featuring the code word "tile" for heroin. Surveillance also uncovered communications between Scaduto and appellant Aiello, who established a tile importing business in 1983 with a warehouse in Buffalo, N.Y.

On September 15, 1983, government agents in Port Newark, N.J., intercepted a tile shipment from Italy to Aiello and found 18 kilograms of heroin in the centerboards of the shipping pallets. The agents replaced almost all of the heroin with harmless white powder and sent the consignment on to Aiello in Buffalo, under surveillance. That night the government applied for a court order authorizing entry into Aiello's Buffalo warehouse and the installation of a video camera. The government did not apply for permission to record sound and did not follow the procedures specified for electronic surveillance under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20 (1982), which does not mention video surveillance. The order, issued on Sep-

tember 16, 1983, by Judge Elfvin in the Western District of New York, granted authorization for the videotaping on the basis of Fed. R. Cr. P. 41(b) and 57(b) and 28 U.S.C. § 1651, specifying that monitoring was to occur only when Aiello or other suspected conspirators were inside the premises.

On the arrival of the shipment at the warehouse agents at the scene observed the tiles being unloaded and noticed that some of the pallets were broken. On September 17 shots taken inside the warehouse revealed Aiello and a co-defendant working on the pallets and removing the five centerboards. Agents outside later observed Aiello loading the centerboards into a truck and driving them to the vicinity of his house, where they were transported into his house. None of the videotaped scenes, however, depict any of the defendants directly handling the packages of white powder. Later that day newly-installed centerboards were attached to the marble-laden pallets.

In the meantime Scaduto, having been advised by Aiello (using a public telephone) that the shipment had arrived, flew under the name "Frank Mineo" from New York City to Buffalo, where he was picked up by Aiello at the airport. Scaduto, in turn, also using public telephones, arranged with Salvatore Bartolotta in New York City to have Pietro Graffeo and Domenico Lo Galbo fly to Buffalo after Scaduto remarked that he would have difficulty bringing "those things down." On September 18 the videocamera recorded Aiello and Scaduto inside the Buffalo warehouse examining the marble tile pallets. On September 19, after Scaduto made plane reservations for three persons under the name "Amare", he, Graffeo and Lo Galbo flew back to New York City.

Three days after the delivery of the tile shipment to Aiello, federal and state agents, with warrants, raided several locations and made a series of arrests and conducted searches. All three appellants were arrested during the roundup. A search of appellant Bartolotta's house turned up heroin, guns, narcotics paraphernalia and a notebook containing records of drug transactions. Although Ragusa escaped arrest, a search of his apartment uncovered heroin, firearms, cash, and narcotics paraphernalia. Searchers at Aiello's house and warehouse, however, could not locate the drugs, the white powder, or the centerboards of the pallets.

A seven count superseding indictment filed on October 20, 1983 charged 10 individuals with a variety of narcotics violations. Scaduto and Aiello were charged with conspiracy to import heroin and to distribute it, 21 U.S.C. §§ 846, 963, importing heroin, 21 U.S.C. §§ 952, 960, and managing a continuing criminal enterprise, 21 U.S.C. § 848. Scaduto was also charged with possession with intent to distribute heroin, 21 U.C.S. § 841. Appellant Bartolotta was charged with one count of conspiracy to possess heroin with intent to distribute, 21 U.S.C. § 846. Seven other defendants, including the still-fugitive Ragusa, were charged with a variety of narcotics offenses.

The defendants moved to exclude the evidence obtained through the wiretap of Salemi's phone on the ground that the state had not properly obtained an extension of the wiretap authorization from the New York State Supreme Court. As part of the motion the defense argued that the court authorization for videotaping at the warehouse was based in part on the fruits of the allegedly unlawful wiretap and that the videotape should accordingly also be excluded. Aside from this there was

no motion to suppress the videotaped evidence on constitutional or other grounds. Pointing out that only defendant Bartolotta had standing to challenge the wiretap evidence, Judge Costantino denied the defense motion to suppress the fruits of the wiretap, *see United States* v. *Ragusa*, 586 F. Supp. 1256 (E.D.N.Y. 1984). The defense also moved unsuccessfully to exclude other evidence, including the items confiscated during the search of appellant Bartolotta's house.

At trial, government witnesses testified to the above events and introduced the physical evidence seized, including 24 kilograms of heroin. The prosecution played excerpts from the wiretaps and videotapes for the jury and contended that the surveillance film showed Aiello unloading the heroin and later inspecting it with Scaduto. At the conclusion of the government's case, the judge granted a judgment of acquittal to one defendant, Rita Volpe.

The defense tried, during opening statements, the body of the trial, and summations, to establish that if the government had made sound recordings at the Aiello warehouse, the conversations there would have revealed that the defendants had simply unloaded the tile, were irate at the breakage en route, and had worked to repair the damaged pallets. The defense contended that the government agents had purposefully failed to record sound because they knew that a sound recording would exculpate the defendants. To bolster this argument, the defense introduced testimony that the warehouse could have been wired for sound, contrary to testimony by one government witness. The defense also showed the jury portions of the videotapes other than those played by the prosecution. Other defense witnesses challenged testimony by a government expert that the overheard conversations included coded references to drugs.

On the Sunday following the close of the defense case, one of the jurors (juror No. 1) received two anonymous phone calls asking for her by name and inquiring whether she was serving on a jury. During the second call the man said he wanted her to help a friend of his but he did not name anyone. In both cases, she hung up. Upset and alarmed, she telephoned the FBI and described herself to duty officer Marilyn Luck as "terrified." On the officer's advice, she spent the evening elsewhere without incident. On the following morning, as she was leaving her home, she was approached by a man whose voice she identified as the one she had heard on the telephone the day before. When the man, in an accent that "might have been Italian," asked whether she was Natalie, the juror rolled up the window of her car and drove off to the courthouse. Upon arrival there, she met a fellow juror and proceeded with him to the judge's chambers where each spoke briefly and separately to the judge in the presence of the judge's law clerks. During one of the two conversations between the judge and juror No. 1, duty officer Luck was present.

Following these conversations, the judge apprised counsel of the incident. All defendants moved for a mistrial. The judge then held a plenary hearing. In the presence of counsel but without the defendants (whom the judge excluded because of any possible chilling effect on the jurors), the judge separately questioned each juror out of the presence of the others. All defendants objected to being excluded from the hearing. However, the defense was allowed to submit questions to be put to the jurors.

When questioned, juror No. 1 repeated her earlier account of the events. In response to questions she indi-

cated that "I'm scared. I don't—I can't be positive if it has or hasn't [affected my impartiality]" and later "I could [be fair]—I think so." In an exchange with the judge, she indicated that sequestration would soothe her fears:

"Juror: I'm having difficulty in being fair because I know I'm going to be going home tonight and I don't know what is going to happen tonight or when the phone rings.

Judge: Suppose I tell you you are not going home tonight?

Juror: I could say right now that I could be impartial because I'm sitting in a courtroom and I feel totally safe.

Judge: All right. You'd be impartial. You could say that now. How about being fair?

Juror: Yes."

Juror No. 1 did indicate that she had some fear about what might happen at the end of the trial but that she could be fair nonetheless. None of the other jurors indicated that they had been approached. nor did any but juror No. 2 know of the approaches made to juror No. 1. Juror No. 2 stated that he felt fully able to be fair and impartial.

The defendants then renewed their motion for a mistrial, which Judge Costantino denied. The judge instead ordered the jury sequestered and the trial proceeded. Judge Costantino gave the government two hours for summation plus twenty minutes for rebuttal and gave the defense a total of four hours, to be divided among the attorneys for the eight defendants. Scaduto's counsel

objected unsuccessfully that the half hour allotted to him was inadequate.

The jury deliberated for four days and then returned a verdict that acquitted five defendants entirely and convicted the three appellants. Scaduto was convicted of conspiring to import heroin and to distribute it, of importing heroin, of possessing it with intent to distribute, and of managing a continuing criminal enterprise. Aiello was convicted of conspiracy to import and to distribute heroin and of importing it, but he was acquitted of managing a continuing criminal enterprise. Bartolotta was convicted of conspiring to possess heroin with intent to distribute.

At sentencing a few months later, Judge Costantino sentenced Aiello to a total of 26 years in prison, followed by a special parole term of 15 years and a total fine of $75,000. The judge sentenced Scaduto to (1) 35 years of imprisonment and a fine of $100,000 on the count of managing a continuing criminal enterprise, (2) 14 years and fines of $25,000 each on the counts for conspiracy to import and to distribute, these sentences to run concurrently with each other and consecutively to the 35 year sentence, and (3) 15 years imprisonment and $25,000 fines each on the two substantive counts, the sentences to run concurrently with each other and consecutive to those on the other counts. Appellant Bartolotta received a sentence of 5 years and a $7,500 fine.

Upon this appeal appellants raise eight issues, four of which warrant discussion: (1) the propriety of the extended wiretap of Salemi's phone, (2) the handling of the approach to juror No. 1, (3) the use of the videotaped

evidence at the trial, and (4) the procedure for handling Scaduto's convictions on lesser-included counts.[1]

Discussion

Admission of Evidence Derived from Wiretaps of Salemi's Phone

Defendant Bartolotta contends that the district court erred in not suppressing her conversations intercepted pursuant to state court authorizations for the tapping of Salemi's telephone. Specifically it is claimed, principally on the basis of state court decisions in *People* v. *Gallina*, 95 A.D.2d 336, 342, 466 N.Y.S.2d 414 (2d Dep't. 1983) (*Gallina I*) and 104 A.D.2d 953, 480 N.Y.S.2d 570, 571-72 (2d Dep't. 1984) (*Gallina II*), that the state district attorney, by not applying for an extension of the first court-authorized Salemi wiretap until after the expiration of the eavesdropping warrant, violated N.Y. Crim. Proc. Law § 700.40, which provides that "[a]t any time prior to the expiration of an eavesdropping warrant, the applicant may . . . apply for an order of extension." In addition, Bartolotta claims that the state violated N.Y. Crim. Proc. Law § 700.35, which states that "[u]pon termination of the authorization in the warrant, eavesdropping must cease and any device installed for that purpose must be removed or permanently inactivated as soon as practicable." In resolving these contentions we are governed by our own decisions to the effect that, although

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[1] The remaining four arguments are: (1) that a ledger recording heroin transactions was improperly admitted as a co-conspirator's statement; (2) that the proof was insufficient to support Scaduto's conviction for managing a continuing criminal enterprise; (3) that summation time was improperly limited; and (4) that the warrant for the search of appellant Bartolotta's house was defective. We find no merit in any of these contentions.

federal law normally controls the admissibility of evidence in federal criminal trials, we will apply more stringent state statutory requirements with respect to wiretap authorizations that are designed to protect an individual's right of privacy. However, when the more stringent requirements result from new state court interpretations of state laws governing evidence-gathering, and when the state officer, prior thereto, relies in good faith on pre-existing less stringent state court interpretations, we will not apply the new interpretations retroactively, at least when to do so would not serve the interests of justice. *United States* v. *Sotomayor*, 592 F.2d 1219, 1223, 1226 (2d Cir.), *cert. denied*, 442 U.S. 919 (1979); *United States* v. *Marion*, 535 F.2d 697, 702 (2d Cir. 1976); *United States* v. *Manfredi*, 482 F.2d 588, 592 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *see also United States* v. *Peltier*, 422 U.S. 531, 537 (1975); *Linkletter* v. *Walker*, 381 U.S. 618, 636-40 (1965).

Were it not for the state court decisions in *Gallina I* and *II*, *supra*, we would have no hesitancy in ruling that the state district attorney's failure to apply for an extension or reactivation of the Salemi wiretap until after the expiration of the first 30-day warrant did not violate § 700.40 since that statute is permissive, using the word "may", rather than mandatory. Nothing on the face of § 700.40, even when read with § 700.35, prohibits a state law enforcement agency, following the termination of a wiretap authorization, from seeking a second eavesdropping order. Indeed, in 1977 the N.Y. State Supreme Court, Second Department, emphasized that the purpose of the § 700.40 provision authorizing police to apply for an extension prior to the expiration of an eavesdropping warrant was to avoid burdening the police with the task of removing eavesdropping equipment upon the termina-

tion of a warrant when an application for an extension was pending. *People* v. *Glasser*, 58 A.D.2d 448, 451, 396 N.Y.S. 2d 442, 424 (2d Dep't. 1977).

Nor do we view *Gallina I* as prohibiting an extension order from being obtained unless it is applied for prior to termination of the earlier order. *Gallina I* simply held that a "temporary deactivation" of eavesdropping equipment during an unexplained six-day gap between the expiration of the first order and the issuance of the second did not satisfy § 700.35. As we hold below (pp. 5515-16) the district court's finding in the present case that the eavesdropping device was permanently inactivated as soon as possible after termination of the first order is supported by the record and not clearly erroneous. Moreover, the reason for the 14-day delay before application was made for the reactivation of the wiretap was fully explained; this period was needed to enable the police to translate into English and transcribe the Sicilian conversations intercepted during Salemi No. 1, so that the results could be disclosed to the court as required by § 700.40. Although it is true that *Gallina II* implied that an extension order may not be obtained after the original authorization expires, it did not squarely so hold. The most that can be said is that New York law on that issue remains uncertain and unresolved.

In any event, even if the *Gallina* decisions were interpreted as Bartolotta urges, they would not necessarily govern the state officers' conduct in the present case since they post-dated the state court Salemi wiretap authorization and therefore could only apply if those decisions were given retroactive effect. In such circumstances it may be presumed that the state law enforcement agencies in the present case acted in good faith reliance on state law as

it had been interpreted at the time when the court wiretap authorizations were sought, *see People* v. *Glasser*, *supra*, and since retroactive application would not further any interest of justice we decline, in accordance with our decision in *Sotomayer*, to give retroactive application to the *Gallina* decisions as so interpreted.

The second issue, whether the eavesdropping device authorized by the first state court order was "removed or permanently inactivated as soon as practicable" in accordance with § 700.35, challenges the district court's finding with respect to a factual question and therefore requires Bartolotta to assume the burden of showing that the district court's finding (*United States* v. *Ragusa*, 586 F. Supp. 1256 (E.D.N.Y. 1984)) was clearly erroneous or the product of an abuse of discretion. No such showing has been made. On the contrary the record clearly supports Judge Costantino's finding that the Salemi No. 1 eavesdropping device was permanently inactivated within the meaning of § 700.35. The wiretap was first installed pursuant to a warrant obtained by the Queens District Attorney's office from the state court on March 30, 1983. The tap was effected through a connection between the two wires servicing Salemi's phone and a second pair hooked up to a "friendly" phone number: by dialing the friendly number, agents could listen to calls on Salemi's line. Agent dialed the friendly number from a phone ("slave phone") at an apartment used for the surveillance. To the slave phone they attached a pen register and tape recorder. When a call was made from the Salemi number the tape recorder would be activated and the pen register would list out the phone number being called. The agents could listen to calls using ear phones or over a speaker in the tape recorder. The pen register, which itself did not record conversations but only the time when the Salemi

phone was taken off the hook, the telephone number dialed, and the time when the receiver was placed back on the hook, did not require court authorization. *Smith* v. *Maryland*, 442 U.S. 735 (1979); *United States* v. *New York Telephone Co.*, 434 U.S. 159 (1977); *People* v. *Meticheccia*, 91 Misc. 2d 129, 397 N.Y.S.2d 514 (S. Ct. App. Term 1977).

When the wiretap order expired on April 29, 1983, the police, who had not yet applied for an extension order, took steps to deactivate the tap. The agent in charge took the tape out of the recorder, hung up the slave phone, and unplugged the tape recorder. At some point, the tape recorder was detached from the slave phone. By taking these steps the police lost the capacity to monitor conversations over the Salemi phone. Further steps to deactivate the wiretap could not be taken without also losing the ability to use the pen register to record the numbers called from the Salemi phone, which the police had the right to do without a warrant. The record thus fully supports the district court's finding that the police had satisfied the requirements of § 700.35. See *United States* v. *Ragusa*, *supra*, 586 F. Supp. at 1258-60.

The Approach to Juror Number One

Appellants argue that the unidentified third party's communications with juror No. 1 warranted a mistrial, particularly in view of the district court's handling of the matter. They maintain that the trial judge's actions, especially his *ex parte* discussions with the two affected jurors, deprived the defendants of a fair trial and that his finding that the jury had not been tainted was clearly erroneous. We disagree. The Constitution "does not require a new trial every time a juror has

been placed in a potentially compromising situation," *Rushen* v. *Spain*, 464 U.S. 114, 104 S. Ct. 453, 455 (1983) (per curiam) (*quoting Smith* v. *Phillips*, 455 U.S. 209, 217 (1982)).

Upon learning of an unauthorized communication by a third person with a juror about a case pending before the juror, the judge must investigate the matter to determine whether the juror's ability to perform her duty impartially has been adversely affected. The extent of that investigation and the method of conducting it will, of course, depend on the surrounding circumstances, including the content of the communication and the apparent sensitivity of the juror. The trial judge must be given wide discretion to decide upon the appropriate course to take, in view of his personal observations of the jurors and parties. *See United States* v. *Phillips*, 664 F.2d 971, 998-99 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136 (1982); *United States* v. *Bufalino*, 576 F.2d 446, 451-52 (2d Cir.), *cert. denied*, 439 U.S. 928 (1978). He may choose to make an immediate inquiry of the juror in open court. But circumstances may caution against that course, such as when the mere knowledge of the existence of the approach to one juror might adversely affect other jurors, or when questioning of the juror before others might have a chilling or embarassing effect on the juror who has been approached by the third party. In the latter instances the trial judge, aided by his personal observation and appraisal of all persons concerned, may choose a private inquiry in the more relaxed atmosphere of the robing room. *See United States* v. *Gagnon*, — U.S. —, 105 S. Ct. 1482 (1985) (per curiam); *Rushen* v. *Spain*, *supra*. However, caution dictates that the interrogation and answers be simultaneously recorded, preferably in the presence of counsel

for the parties. Unless the communication with the juror is patently innocuous, the judge, before ruling on motion for a mistrial, would be well advised to hold a *voir dire* hearing. As the Supreme Court stated in *Remmer* v. *United States*, 347 U.S. 227, 229-30 (1954), "[t]he trial court should not decide and take final action *ex parte* [on information that a third party has contacted a juror], but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate."

Applying these principles, we conclude that Judge Costantino erred in not having made a simultaneous verbatim record of his initial private inquiries of jurors No. 1 and No. 2. It would also have been preferable to have had counsel present at that inquiry. However, without condoning these procedural omissions we are satisfied that in this case the error was harmless, for the reason that immediately following his initial private questioning of the two jurors he apparently recognized that the third person's approach was not patently inconsequential and advised counsel of the substance of what had transpired. Thereupon Judge Costantino held a plenary hearing, in which defendants' lawyers fully participated and in which he examined each of the 12 jurors separately. When these examinations were completed, and with the defendants then present, counsel for both sides addressed the issues raised at the hearing. At the end of the hearing Judge Costantino denied defendants' motion for a mistrial but ordered the jury sequestered for the remainder of the trial. In the circumstances of this case we cannot say that these procedures were inadequate to ensure that defendants were not deprived of their right to a fair trial. The record fails to support appellants' contention that in so

ruling Judge Costantino was motivated by a desire to avoid a second trial rather than by his conclusion that juror Nos. 1 and 2 could continue to act impartially regardless of the attempt by the anonymous third person to communicate with juror No. 1.

We also find that it was within the district judge's discretion to conclude that the potential chilling effect on the openness and candor of the jurors' responses to questions about their reactions to the third party communications justified his excluding the defendants from the *voir dire* part of the hearing. *Cf. United States* v. *Gagnon*, *supra*, U.S. at ——, 105 S. Ct. at 1485 (Fifth Amendment does not require defendants' presence during brief meeting between judge and juror over minor incident); *United States* v. *Williams*, 737 F.2d 594, 612 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 1354 (1985) (finding it permissible that counsel merely received a transcript of the judge's inquiries to jurors exposed to third party); *United States* v. *Buchanan*, 633 F.2d 423, 427 (2d Cir.), *cert. denied*, 451 U.S. 912 (1981) (only court reporter and law clerks present during juror interviews).

The district court's finding, after a hearing, that no prejudice had occurred from the third party contact and that the jury remained able to render an impartial verdict is entitled to deference. *See, e.g., Patton* v. *Yount*, —— U.S. ——, 104 S. Ct. 2885, 2892 n.12 (1984) (district court's finding of fact on whether juror should be disqualified may be set aside only for "manifest error"); *Rushen* v. *Spain*, *supra*, 104 S. Ct. at 456 (trial court's factual finding that jury's deliberations were not biased deserves a "high measure of deference"); *United States* v. *Bufalino*, *supra*, 576 F.2d at 451 (district court's finding on jury prejudice issue entitled to deference). The finding in this case was clearly reasonable.

No threats had been made to jurors nor had any names of defendants been mentioned, and the jurors, once sequestered, could be assured of their safety. Juror No. 1's statements indicated that she did not believe that her ability to act fairly with respect to any of the defendants had been compromised by the third party communication. *Cf. Smith* v. *Phillips*, *supra*, 455 U.S. at 217 n.7 (*quoting Dennis* v. *United States*, 339 U.S. 162, 171 (1950)) ("'[O]ne who is trying as an honest man to live up to the sanctity of his oath [as a juror] is well qualified to say whether he has an unbiased mind in a certain matter.'"). In response to the judge's final question whether she could "sit fairly and impartially on this jury and come to a conclusion?" she answered "I think so." At other points during the *voir dire*, she gave unequivocal answers to questions the judge posed about her capacity to act fairly, impartially, and without bias or prejudice.

The accuracy of the district judge's finding about the ability of the jury to render an impartial verdict is confirmed by the care which the jury took in its deliberations; over a period of four days it requested multiple readbacks of testimony and then determined that some defendants should be acquitted altogether, that others should be acquitted on some charges, and that others were guilty of all crimes charged. Given the jurors' ignorance of the identity of the anonymous third person who approached juror No. 1 and which defendant, if any, that person represented, the jury's careful discrimination in weighing the evidence with respect to each defendant indicates strongly that it was not influenced by the third person's communications with juror No. 1.

The Admission of the Videotaped Evidence

Although appellants did not at trial object on constitutional grounds to the admission of videotapes of the activity in the warehouse, they now urge us *sua sponte* to rule under Fed. R. Crim. P. 52(b) that the admission of this evidence was "plain error" because it may have exceeded the district court's authority and have violated the Fourth Amendment. We decline the invitation for the reason that, by failing to raise the issue at trial, which might have provided us with an adequate record for review, appellants clearly waived their right to have the issue reviewed. It is our policy that "[w]here . . . a defendant at trial deliberately waives or bypasses an attack upon the voluntariness of a confession, including affirmative use of it in an effort to exculpate himself, he should not be permitted to change his position on appeal, absent a showing of new circumstances unknown to him at the time of trial." *United States ex rel. Terry* v. *Henderson*, 462 F.2d 1125, 1130 (2d Cir. 1972).

We disagree with appellants' present contention that the objections voiced by them in the district court were adequate to enable us on appeal to rule on the constitutional issue now raised for the first time. Aiello's pretrial motion to suppress evidence was based solely on the contention that the September 16th videotape order was tainted because it was obtained mainly in reliance on the allegedly defective wiretap order, and not on any claim that the videotape evidence was itself inherently unlawful. More important, the district court properly upheld the validity of the wiretap order, thus eliminating the alleged defect in the videotape evidence. Faced with the admission of the wiretaps, appellants' trial strategy was no longer to seek exclusion of the videotapes but to argue

that the government's failure to wire the warehouse for sound demonstrated that the warehouse conversations were innocent and that the government was acting in bad faith. Indeed, appellants so argued in their openings.

Defendants' two passing attempts at trial to have the videotape material excluded involved only evidentiary, not constitutional, objections: counsel for Aiello contended that because of the absence of sound recording the prejudicial impact of the videotapes exceeded their probative value, while counsel for Scaduto argued that an inadequate foundation had been laid for their admission. These objections, which occupy fewer than 5 pages in a transcript of more than 5,000 pages, hardly suggest that defendants were seriously concerned by the possibility that admission of the videotapes would violate their constitutional rights.

Even were we to find that appellants had not deliberately failed to press their objection to the admission of the videotapes, other factors we cited as relevant in *United States ex rel. Terry* v. *Henderson*, *supra*, would justify our not exercising the discretion that Fed. R. Crim. P. 52(b) confers upon us. As in *Terry*, appellants here made "affirmative use of [the videotapes] in an effort to exculpate [themselves]." *Id.* at 1130. Their claim of substantial prejudice from the admission of the allegedly illegally obtained videotapes is thus seriously compromised. We note in this regard that three of the five people shown in the videotape films were acquitted of all charges.

A *sua sponte* appellate ruling in this case on the constitutionality of a non-audio videotape order would be inappropriate for still another reason—the inadequacy of

the record. Since no pre-trial motions directly relating to the videotapes were made, the video order, application and supporting affidavits were never filed with the district court. While the parties have sought to remedy this deficiency by agreeing to a "Stipulation to Expand the Record," they have—since oral argument—continued to submit papers showing disagreement over such important issues as whether the Department of Justice authorized the United States Attorney for the Western District of New York to apply for a court order authorizing the installation of the video camera inside the Aiello warehouse. In the absence of the kind of record that would have been developed had appellants raised their constitutional claim below, we decline to consider that claim when raised for the first time on appeal.[2]

Scaduto's Lesser-Included Offenses

As the government concedes, there was error in preserving appellant Scaduto's separate convictions on two lesser-included conspiracy counts and in sentencing him on those counts in addition to his sentence for managing

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[2] The two factors from *United States ex rel. Terry, supra*, just considered, serve to distinguish this case from *United States* v. *Tortorello*, 480 F.2d 764 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973). In *Tortorello*, defendants had made no affirmative use of the wiretap material. In addition, even though the Court considered only the facial constitutionality of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, it did so against the background of an extensive post-trial evidentiary hearing on the wiretap issue, at which the procedures involved in obtaining the wiretap order were described and the district court considered affidavits offering grounds for issuance of that order. *See United States* v. *Tortorello*, 342 F. Supp. 1029 (S.D. N.Y. 1972) (denying motion to suppress evidence after extensive evidentiary hearing).

a continuing criminal enterprise.[3] Although we recently set out the proper course of action for handling convictions on such lesser-included offenses, *see United States* v. *Osorio Estrada*, 751 F.2d 128, 134-35 (2d Cir. 1984), *modified on reh'g on other grounds*, 757 F.2d 27 (2d Cir. 1985), the issue requires renewed attention in view of the Supreme Court's decision in *Ball* v. *United States*, 105 S. Ct. 1668 (1985). *See United States* v. *Borello*, No. 84-1367, slip op. at 4503 n.18 (2d Cir. June 12, 1985) (stating that "we wait for another day to decide whether *Ball* overrules *Osorio Estrada*").

In *Osorio Estrada* we reconciled conflicting Second Circuit precedents,[4] by holding that when a defendant is convicted of an offense and of lesser-included offenses, the proper course of action is to "combine" the "convictions on the lesser offenses . . . with the conviction on the greater offense," *United States* v. *Osorio Estrada*, *supra*, 751 F.2d at 135, so that the convictions for the lesser offenses would cease to exist unless the conviction for the greater offense should be reversed, in which event the defendant could be punished for the lesser offenses. We explained that:

> "Under this method, the convictions on the lesser counts become combined with that on the compound offense and would *not* be merged out of existence.

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[3] *See United States* v. *Young*, 745 F.2d 733, 748-50 (2d Cir. 1984) (holding that § 846 conspiracy offenses are lesser included offenses within a charge of managing a continuing criminal enterprise in violation of § 848), *cert. denied*, 105 S. Ct. 1842 (1985).

[4] In some cases, the Circuit had vacated appellant's conviction for a lesser-included offense, *see, e.g.*, *United States* v. *Rosenthal*, 454 F.2d 1252, 1255 & n.2 (2d Cir.), *cert. denied*, 406 U.S. 931 (1972). In others, we had merely vacated the sentence on the lesser-included offense. *See, e.g.*, *United States* v. *Mourad*, 729 F.2d 195, 202 (2d Cir.), *cert. denied*, 105 S. Ct. (1985).

> This leaves the part of the conviction on the lesser offense unaffected should the compound offense be invalidated as a matter of law. The convictions on the lesser offenses would not exist as separate convictions so long as the § 848 conviction remained in place. Thus the risk of any collateral consequences that separate convictions may entail would be eliminated and satisfy the concern expressed in *Rosenthal* . . . that a defendant not be prejudiced by outstanding separate convictions on lesser included offenses." *Id.*

Judge Kearse wrote separately to say that she deemed it appropriate for the court to "vacate the convictions on the two lesser-included offenses, on the condition that the convictions on those offenses would be reinstated in the event that the conviction on the greater offense . . . were ever overturned." *Id.* at 135. Nevertheless, she "concur[red] in the judgment in the hope that its import is that the convictions on the lesser-included offenses have ceased, in light of the conviction on the greater offense, to be a basis upon which collateral consequences, such as more severe parole treatment, may follow." *Id.*

A few months later the Supreme Court decided *Ball* v. *United States*, *supra*, which held that a defendant could not separately be punished for violating both 18 U.S.C. § 99(h) (1) (1982) (prohibiting the receipt of a firearm by a convicted felon) and 18 U.S.C. App. § 1202(a) (1982) (prohibiting a convicted felon from, *inter alia*, possessing a firearm in commerce), based on his handling of one gun on one occasion.[5] Having determined that

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[5] Although the Court did not use the term lesser-included offense, we noted in dicta in *United States* v. *Borello*, *supra*, slip op. at

[Footnote continued on following page]

Congress did not intend to impose duplicate punishment for the same conduct, the Court held that, although the jury could properly consider both sets of charges, "the District Judge should enter judgment on only one of the statutory offenses." 105 S. Ct. at 1674. As for Ball, who had received concurrent sentences on the two counts, the Court stated that

> "the only remedy consistent with the congressional intent is for the district court, where the sentencing responsibility resides, to exercise its discretion to vacate one of the underlying convictions. . . . One of the convictions, as well as its concurrent sentence, is unauthorized punishment for a separate offense. *See Missouri* v. *Hunter*, 459 U.S. 359, 368, 103 S. Ct. 673, 679, 74 L. Ed.2d 535 (1983).
>
> "The second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence. The separate *conviction*, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction. . . . Thus, the second con-

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4503 n. 18, that the *Ball* case "appears to fall within a lesser-included context." The count charging a violation of § 922(h)(i) is a lesser-included offense of the count charging a violation of § 1202(a) in that "proof of receipt of a firearm *necessarily* includes proof of illegal possession of that weapon," 105 S. Ct. at 1672, although "the converse may not be true," *id.* n.9.

viction, even if it results in no greater sentence, is an impermissible punishment." *Id.*

As we recognized in *Borello*, there appears to be some inconsistency between the Supreme Court's statement in *Ball* that the District Court must vacate one of the two convictions and the approach in *Osorio Estrada* of combining the two convictions. However, we recognize that the "*Ball* Court did not address the issue explored in *Osorio Estrada*, namely the subsequent vacation on collateral attack of the count on which judgment had been imposed." *United States* v. *Borello*, *supra*, slip op. at 4503 n.18.

The Supreme Court's objective in *Ball*, to avoid the punitive consequences that might follow from having dual convictions on a defendant's record, is achieved by the procedure adopted by us in *Osorio Estrada* of "combining" convictions to "eliminate" the "risk of any collateral consequences that separate convictions may entail." 751 F.2d at 135. A combined lesser conviction could not properly be considered, for instance, in determining a defendant's eligibility for parole, in sentencing him in the future under a recidivist statute or in impeaching his credibility at a later trial. However, should the defendant's conviction of the greater offense be reversed, an issue not before the Supreme Court in *Ball*, our procedure would resuscitate the lesser conviction and permit punishment for the lesser crime. The consequence is the same as if the lesser conviction had been vacated on condition that it might be revived only upon reversal of the greater one.[c]

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[c] Since the "convictions on the lesser offenses would not exist as separate convictions so long as the [conviction on the greater offense] remained in place," *United States* v. *Osorio Estrada*, 751 F.2d at 135, we conclude that there is no practical difference

[Footnote continued on following page]

We believe that the procedure followed by us in *Osorio Estrada* is consistent with the Court's decision in *Ball* and observes its prohibitions. As the Supreme Court has recognized, it is plainly consistent with congressional intent that a defendant found by a jury to be guilty of both crimes be punished for one or the other.[7] Were punishment for the greater charge somehow precluded, whether at the time of trial or thereafter, we cannot conceive that congressional intent is in any way disserved or hindered by allowing punishment for the lesser. Rather, the reactivation of the lesser conviction facilitates the congressional purpose of ensuring that a defendant is punished for whatever degree of a crime he is adjudged to be guilty of having committed. If the conviction on the greater offense is reversed, it is thus appropriate that the defendant duly receive punishment for the lesser.[8] (*Cf. United States* v. *DiFrancesco*, 449 U.S. 117

[Footnote continued from previous page]

between the Supreme Court's prescription to vacate a conviction and our practice of "combining" a lesser conviction into a conviction on a greater offense, *except* that if the conviction on the greater offense were eventually to be overturned, our practice would, by design, resuscitate the lesser conviction and thereby ensure that the defendant would not avoid punishment for the lesser crime. We do not believe that the potential to reactivate a conviction in this way creates impermissible cumulative punishments.

[7] When one crime is a lesser-included offense of another, cumulative punishment is disallowed when a defendant is convicted of both for the reason that Congress did not intend to impose punishment for both crimes. *Cf. Missouri* v. *Hunter*, 459 U.S. 359, 368-69 (1983) (two statutes punishing the same acts); *Whalen* v. *United States*, 445 U.S. 684, 691-92 (1980); *see also Ball* v. *United States*, 105 S. Ct. at 1671-72. The defendant may be charged with both crimes, *id.* at 1671, and could be convicted of either (or both).

[8] Naturally, the lesser conviction would only reactivate if the error that produced the reversal of the conviction on the greater offense was not one that also tainted the conviction on the lesser offense. Sentencing on the lesser offense would occur following the reversal of the conviction on the greater offense.

(1980); *McClain* v. *United States*, 676 F.2d 915, 917 (2d Cir. 1982), *cert. denied*, 459 U.S. 879 (1982). Any time already served would be counted as credit against the newly imposed sentence. In effect, the situation at this point would be virtually the same as if the jury had convicted on the lesser offense rather than on the greater. If the government were able to retry the defendant on the greater charge and chose to do so, any conviction on the greater offense would again replace the conviction on the lesser, requiring that the sentence on the lesser be vacated and the two convictions once again combined.

For the foregoing reasons we find no ground for departing from the procedure we described in *Osorio Estrada* for handling convictions for lesser and greater offenses, which accords with the Supreme Court's decision in *Ball*. We therefore vacate appellant Scaduto's sentences for conspiracy to import heroin, conspiracy to distribute heroin, and conspiracy to manage a continuing criminal enterprise, and we remand for the purpose of combining the convictions on the lesser counts with that on the greater and for resentencing. We stress that the fact of Scaduto's having been convicted on the lesser included charges is to have no collateral effect of any kind unless his conviction on the continuing criminal enterpirse charge should be overturned.

We have considered the remaining arguments raised by appellants and find each of them to be without merit. The judgments of the district court are affirmed except as to appellant Scaduto, whose judgment is vacated and remanded for the purpose of combining the convictions and resentencing.

APPENDIX H

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IN RE: ANDREA AIELLO, a/k/a "ANTONIO AIELLO," FRANCESCA BARTOLOTTA, and LORENZO SCADUTO,

Petitioners

Docket Number:
86-3018

United States Court of Appeals
Filed
May 6, 1986
Elaine B. Goldsmith, Clerk
Second Circuit

A petition for writ of mandamus and/or prohibition having been filed,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED without prejudice to renewal within 30 days of the date of this order.

Dated: 5-6-86

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of June, one thousand nine hundred and eighty-eight.

Present:

Hon. James L. Oakes,
Hon. Richard J. Cardamone,
Circuit Judges,
Hon. Oscar H. Davis,*
sitting by designation.

United States Court of Appeals
Filed
Jun 27, 1988
Elaine B. Goldsmith, Clerk
Second Circuit

88-2140

United States of America,

Respondent,

v.

Andrea Aiello and
Lorenzo Scaduto,

Appellants.

ORDER

A motion having been made herein by appellant Andrea Aiello (1) to refer motion and instant appeal to panel on 86-2236 appeal and (2) to permit/compel the district court to consider all evidence adduced at hearing of January 29 and February 3, 1988, or, in the alternative, to vacate judgments and grant a new trial,

Upon consideration of the motion and the accompanying 52-page memorandum of law, it is

ORDERED that Part 1 of the motion be denied as moot and that Part 2 of the motion be and hereby is denied.

FOR THE COURT:

Elaine B. Goldsmith, Clerk

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*Judge Davis, of the United States Court of Appeals for the Federal Circuit, participated in the consideration and decision of this motion, but died before this order was filed.